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No. _____

IN THE

Supreme Court of the United States

October Term, 1980

BALLY MANUFACTURING CORPORATION,
a Delaware corporation,
Appellant

vs.

NEW JERSEY CASINO CONTROL COMMISSION,
Appellee

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. *The Sherman Act Right of the Most Efficient Competitor to Prevail.* Does the Casino Control Commission's Regulation 19:46-1.32 conflict with the Sherman Act, 15 U.S.C. § 1:

(a) by treating successful competitors as monopolists without regard to whether their success was due solely to superior product, service, and reliability;

(b) by denying casinos access to their preferred source of supply;

(c) by mandating anticompetitive market allocation; and

(d) by compelling Appellant to reduce its lawful market share from 80% to 50% and to refrain from competing for the remaining 50%?

2. *The Application of the State Action Exemption to Paramount Federal Antitrust Law.* Was federal antitrust law rendered inapplicable on "state action" grounds when the Casino Control Commission ruled, without explicit or implicit anticompetitive direction in the state statute, that 50% of the market was to be inaccessible to any one competitor?

3. *Due Process and Minimal Standards of Administrative Procedure.* Did New Jersey deprive Appellant of liberty and property without due process of law by a confluence of the following circumstances:

(a) by denying Appellant, the sole firm affected by the regulation, an evidentiary hearing on crucial questions of fact, particularly whether (i) Appellant "dominated" the market or in fact consumers dominated the market through expression of their unconstrained preference for Appellant's products, (ii) Appellant's machines were superior, (iii) entry barriers were low, and (iv) competition and potential competition existed and the extent thereof;

(b) by prescribing a concededly arbitrary figure of 50% as the maximum market share for Appellant without supporting evidence, findings or rationale;

(c) by disregarding at both the administrative and judicial review stages less restrictive alternatives proffered by Appellant;

(d) by drastically restricting Appellant's liberty and property on the basis of a "hearing", the outcome of which was predetermined in a previously prepared statement of policy; and

(e) by ignoring evidence that the source of the 50% regulation was a disingenuous maneuver by a competitor of Appellant, supported only by competing suppliers and resisted by buyers, seeking a commercial preserve free of effective competition?

*Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, Appellant lists the following corporations which are subsidiaries of Appellant (not wholly owned):

Bally's Park Place, Inc.

American Amusements of Arkansas, Inc.

Bally France, S.A.

There are no other corporations subject to disclosure under Rule 28.1.

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OPINION BELOW

The opinion of the Supreme Court of New Jersey, which appears in the Appendix, p. Ala, *infra*, is reported at 85 N.J. 325, 426 A.2d 1000 (1981).

No. .....

IN THE

Supreme Court of the United States

October Term, 1980

BALLY MANUFACTURING CORPORATION,
a Delaware corporation,
Appellant

vs.

NEW JERSEY CASINO CONTROL COMMISSION,
Appellee

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

JURISDICTION

Bally Manufacturing Corporation, the Appellant, appeals from the final judgment of the Supreme Court of New Jersey,[1] dated March 17, 1981, sustaining Regulation 19:46-1.32 of the New Jersey Casino Control Commission (the "Casino Control Commission"), against challenge on federal constitutional and statutory grounds delineated above under the heading of Questions Presented.

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[1] Appellant originally filed its appeal in the Superior Court of New Jersey, Appellate Division. However, the case was never heard in that court because the Supreme Court of New Jersey agreed to accept the case on a Motion for Certification of Appeal Pending Unheard in the Appellate Division. The Supreme Court of New Jersey thus was the first and only court to hear and decide this case on the merits.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).[2] The appeal is being docketed in accordance with Rule 12 within 90 days from the date upon which the Supreme Court of New Jersey entered its final judgment.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATION

ARTICLE 6, CLAUSE 2, UNITED STATES CONSTITUTION:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

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[2] *See STERN AND GRESSMAN, SUPREME COURT PRACTICE* (5th ed. 1978), p. 160:

> The reference in § 1257(2), to a "statute of any state" has been defined many times to include every legislative action to which a state gives the force of law. See *Williams v. Bruffy*, 96 U.S. 176, 183 (1878). This definition covers much more than the laws passed by a state legislature. It also encompasses state constitutional provisions, municipal ordinances and bylaws, and orders of state commissioners and governing bodies issued in the exercise of their delegated legislative authority.

The Appellant requests that this application be considered in the alternative as a petition for certiorari should the Court deem appeal inappropriate.

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

15 U.S.C. § 1 (SHERMAN ANTI-TRUST ACT):

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

5:12-1(b)(12), NEW JERSEY STATUTES ANNOTATED:

Since the economic stability of casino operations is in the public interest and competition in the casino operations in Atlantic City is desirable and necessary to assure the residents of Atlantic City and of this State and other vistors [sic] to Atlantic City varied attractions and exceptional facilities, the regulatory and investigatory powers and duties conferred by this act shall include the power and duty to regulate, control and prevent economic concentration in the casino operations and the ancillary industries regulated by this act, and to encourage and preserve competition.

5:12-63, NEW JERSEY STATUTES ANNOTATED:

The Casino Control Commission shall have general responsibility for the implementation of this act . . . including, without limitation, the responsibility:

> c. to promulgate such regulations as in its judgment may be necessary to fulfill the policies of this act; . . .

5:12-69(a), NEW JERSEY STATUTES ANNOTATED:

a. The commission shall be authorized to adopt, amend or repeal such regulations, consistent with the policy and objectives of this act, as it may deem necessary

or desirable for the public interest in carrying out the provisions of this act.

56:9-18, NEW JERSEY STATUTES ANNOTATED:

This act shall be construed in harmony with ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practicable, a uniformity in the laws of those states which enact it.

19:46-1.32, NEW JERSEY ADMINISTRATIVE CODE:

a. Unless otherwise approved by the Commission, no more than 50% of the slot machines used in any casino in this State to conduct gaming shall have been manufactured by any one manufacturer or by any enterprise under the direct or indirect control of said manufacturer.

STATEMENT OF THE CASE

Appellant, Bally Manufacturing Corporation, designs and manufactures slot machines in Chicago and sells them in interstate commerce. These slot machines are sold for use in state-licensed casinos in Nevada, in Atlantic City, New Jersey, and overseas. In recent years, Appellant has supplied approximately 80% or more of the new machines used in the United States. Other competitors, both domestic and foreign, supply the balance. Entry barriers are low. Some casinos manufacture their own machines, and producers of other types of coin-operated equipment (*e.g.*, pinball games and automatic vending machines) have entered and can readily enter the field. There is also a substantial market in second-hand machines. The market is limited owing to the fact that only two states have, as yet, legalized casino gaming. Because of the limited market, certain types of equipment are often supplied by only one manufacturer. That is the case, for example, with roulette wheels.

New Jersey's Casino Control Act, N.J.S.A. 5:12-1 et seq., provides for extraordinarily detailed scrutiny of casino operators and firms supplying casinos as well as close control of structures, employees and practices. Appellant is licensed both as a supply firm and, through a majority-owned subsidiary, as a casino operator. It thus has passed the stringent character and responsibility tests of the New Jersey Casino Control Act.

Quite different questions were presented in the proceedings here challenged. At its meeting on December 20, 1978, the Casino Control Commission proposed Regulation 19:46-1.32, providing that no more than 50% of slot machines used by any casino could be machines of a single manufacturer.[3] On June 20, 1979, the Casino Control Commission adopted the 50% regulation and an accompanying statement of policy. Regulation 19:46-1.32 excludes Appellant from 50% of the market without regard to the merits of its product, the legitimacy of its methods of sale, or the preferences of casinos. This presents the conflict between state law and federal antitrust principles noted in Question One above.[4]

The second question presented, relating to the "state action" exemption, arises because the 50% regulation was adopted and sustained on grounds that the State of New Jersey had exercised its power to displace federal competition laws by state regulation. The Supreme Court of New Jersey so held, relying principally on *Parker v. Brown*, 317 U.S. 341 (1943).[5]

The third question presented, relating to Due Process and minimal standards of administrative procedure, was addressed by the opinion of the Court below with respect

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[3] Appendix, pp. A34a-A52a.

[4] Appendix, pp. A6a-A7a.

[5] Appendix, pp. A11a-A13a.

to Appellant's claim that it was entitled to a quasi-judicial hearing because it was uniquely the target of the regulation.[6] Other ingredients of arbitrariness in the procedures discussed below were of equal importance. Individually and in the aggregate, these departures from procedural norms, especially in the context of reconciling state action with paramount federal law, denied Appellant Due Process of law.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal involves a confrontation between the federal antitrust laws and state regulation of legalized gaming casinos. The recent and rapid expansion of legalized gambling and of the associated equipment supply business makes it important and inevitable that the Supreme Court demarcate the limits of state regulations that impinge upon national competitive policy.[7] This is especially important where, as here, the state regulation ex-

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[6] Appendix, pp. A7a-A11a. *See also* Appendix, pp. A53a-A54a, where the Casino Control Commission notified Appellant that the form the hearing would take would be quasi-legislative.

[7] As of the date of this writing, there are fifteen states which conduct lotteries, four states which permit pari-mutuel wagering on jai-alai, thirteen which permit pari-mutuel wagering on dog racing, and thirty which permit pari-mutuel wagering on horse racing. Two states have legalized off-track betting, six states have legalized card rooms and two states have legalized casino gaming.

There is legislation pending in eleven states to institute a state lottery, two states are considering pari-mutuel wagering on jai-alai, two states are considering off-track betting, and six states are considering the legalization of casino gaming.

There are thus only four states which have no form of legalized gambling and two of those are currently reevaluating their position.

tends beyond the local core activity of legalized gambling, which traditionally lends itself to extensive police power regulation, and reaches manufacturing and selling casino equipment in interstate commerce.

This appeal also presents the basic question of whether entrepreneurs in this sensitive and closely regulated business may be denied the protection of the Due Process Clause against arbitrary procedures and dispositions. Such a denial of constitutional protections is especially likely in this area because of persistent religious and political tensions over state tolerance of or participation in the legalized gambling business.[8]

I. APPELLANT HAS THE RIGHT UNDER THE SHERMAN ACT TO PREVAIL OVER COMPETITORS BY SUPERIORITY OF PRODUCT, SERVICE AND RELIABILITY

It is settled federal law that a competitor is entitled to gain and keep whatever share of the market he can command by greater efficiency, superior product or other lawful competitive activity. As Judge L. Hand said in *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945):

> [T]he successful competitor, having been urged to compete, must not be turned upon when he wins.

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[8] Compare the liquor industry, an equally sensitive and highly regulated industry, where state exercise of inherent police power is increasingly being found to intersect with paramount federal antitrust law. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), *Grendel's Den, Inc. v. Goodwin*, 1981-1 Trade Cases ¶ 63,978 (1st Cir. 1981); *Serlin Wine and Spirit Merchants, Inc. v. Healy*, 1981-1 Trade Cases ¶ 63,950 (D. Conn. 1981).

This principle has been repeatedly affirmed in judicial and administrative decisions.[9] The federal antitrust laws protect competition, not competitors.[10]

The Casino Control Commission and the Court below rejected this principle which was repeatedly advanced by Appellant.[11]

II. "STATE ACTION" WITHOUT STATE LEGISLATIVE DIRECTION IS NOT INSULATED FROM PARAMOUNT FEDERAL ANTITRUST LAW

An essential element of "state action" as an insulation from federal antitrust law is that the challenged restraint be clearly articulated and affirmatively expressed by the State, as sovereign, as state policy.[12] This principle has been vigorously applied to limit permissible "state" restraints of trade where the relevant state legislation was neutral, ambiguous or delegated legislative discretion to public or private agencies without clearly mandating the

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[9] *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); *Telex Corp. v. International Bus. Mach. Corp.*, 510 F.2d 894, 927 (10th Cir.), cert. dismissed, 423 U.S. 802 (1975); *Transamerica Computer Co. v. International Bus. Mach. Corp.*, 481 F. Supp. 965 (N.D. Cal. 1979); *Van Dyk Research Corp. v. Xerox Corp.*, 478 F. Supp. 1268 (D.N.J. 1979), aff'd, 631 F.2d 251 (3rd Cir. 1980); *E. I. DuPont deNemours & Co.*, [1979] Trade Reg. Rep. (CCH) ¶ 21,613.

[10] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

[11] Appendix, pp. A8a and A11a-A13a. *See also* Appendix, pp. A88a-A93a.

[12] *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) ("... not every act of a state agency is that of the State as sovereign.")

This declaration of policy is notable in that:

(a) It does *not* mandate displacement of competition by regulation. To the contrary, it affirms the legislative purpose "to encourage and preserve competition";

(b) In speaking of the "duty to regulate, control, and prevent economic concentration", no definition of the term "concentration" is provided. The plainly intended meaning was concentration resulting from mergers, predatory practices, or other anticompetitive maneuvers identified by federal antitrust laws,[16] not market leadership resulting from free customer preference. This follows (i) from the unbroken scheme of antitrust case law which safeguards the successful competitor, (ii) from the New Jersey legislature's bracketing of prevention of concentration with "encouraging competition" in the Casino Control Commission's enabling statute, thereby requiring that regulations comport with both standards, and (iii) from the absence of any legislative history showing an intent to make a radical departure from established antitrust jurisprudence in this obviously antitrust-oriented declaration of policy; and

(c) The "duty", as declared by the state legislature, is to "regulate, control, and prevent" concentration, not to "deconcentrate" an established industry not shown to have operated anticompetitively.

Appellant proffered alternative regulations designed to "regulate" and "control" without excluding it from competition. These alternative regulations mandated compulsory non-discriminatory supply. Neither the Casino Control Commission nor the Court below considered or discussed, even in passing, the relative merits of these less restrictive alternatives.

It is, in any event, clear that the Casino Control Commission did not and does not regard itself as being under

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[16] Notably New Jersey antitrust law calls for interpretation consistent with this tradition. *See* N.J.S.A. 56:9-18.

a legislative mandate to displace competition or to "deconcentrate". Rather, the issue of whether to regulate and what regulation to adopt has been treated by the Casino Control Commission at all times as a matter of discretion.

The regulation itself provides for discretionary dispensation from the 50% rule.[17] The choice of the 50% figure was concededly discretionary to the point of being arbitrary.[18] The Casino Control Commission has not felt similarly mandated to "deconcentrate" other customer service industries including, for example, roulette wheels, where an overwhelming percentage of the equipment is supplied by a single producer. The opinion of the Court below recognized that the Casino Control Commission is free to repeal the regulation whenever it deems the regulation "unworkable, unfair or unnecessary".[19]

The 50% regulation thus is entirely a creature of the Casino Control Commission, unconstrained by any mandate of the New Jersey legislature. Dictum to the contrary

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[17] The rule applies "unless otherwise approved by the Commission". N.J.A.C. 19:46-1.32. There is specific provision for dispensing with the limitation upon a finding that there has been "a good faith effort to seek out and obtain slot machines from more than a single manufacturer and that a number of adequate slot machines sufficient to comply with the said limitation are not reasonably available". Note that the alternative machines must be used if they are "adequate", regardless of the superiority of Appellant's machines.

[18] The choice of the 50% figure was characterized by the Chairman of the Casino Control Commission as "randomly selected", "on its face . . . arbitrary and capricious, [without] factual basis". Appendix, p. A71a. No rationale was advanced for 50%. A far lower figure would obviously suffice to provide a "showcase" for competitors, although clearly no legislatively protected "showcase" was required in view of the evidence that casinos compared Appellant's machines with their competitors in actual operations.

[19] Appendix, p. A11a.

in the opinion of the Court below[20] is contradicted by other portions of the opinion acknowledging the full scope of the Casino Control Commission's discretion to adopt, modify, or repeal the regulation. The dictum of the Court below makes sense only if it is understood to mean what the statute says, namely, that the Casino Control Commission is under a mandate to address issues of concentration and competition by means of pro-competitive regulation. If in fact there were a sufficient statutory mandate, the Casino Control Commission would have complied had it promulgated a *pro-competitive* regulation, such as that proffered by Appellant, instead of the anti-competitive 50% regulation.

Issues of federalism can no more be resolved by mechanical rules than can the comparable "act of state" issues, where courts must decide how far the antitrust laws govern behavior abroad which has anticompetitive consequences on American trade. A model of sensitive analysis in the latter area is provided by *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979).[21]

There is a special need for a Supreme Court decision in this case to make it clear that a state agency cannot lift itself by its own bootstraps out of the reach of the federal

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[20] Appendix, p. A13a: "First, as we have already held, the regulation is clearly authorized, *indeed required*, by the expression of State policy contained in the Casino Control Act." (Emphasis supplied) Notwithstanding the phrase "as we have already held," the only relevant holding in earlier portions of the opinion is "that the regulation in question is within the framework of the broad powers conferred on the Commission by the act." Appendix, p. A7a. *See also* Appendix, p. A9a: Commission "was obligated to take [unspecified] action. . ."; Appendix, p. A11a: Commission "had a mandate to prevent economic concentration. . ."

[21] *See also Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); American Law Institute, Foreign Relations Law of the United States (March 27, 1981) (rev. tentative draft no. 2).

antitrust laws with a gratuitous and equivocal declaration that anticompetitive regulations adopted without legislative guidance are "required".

III. DUE PROCESS WAS DENIED IN THE STATE ADMINISTRATIVE PROCEEDINGS

The Fourteenth Amendment guarantees a minimum level of fundamental procedural fairness which the states must meet.[22] Determining where this line is drawn is not a simple matter of classifying the proceedings as quasi-legislative or quasi-judicial. What was done to the citizen, whether he had an effective opportunity to protect himself against arbitrary action, the social cost of alternative pro-

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[22] *See Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 414-15 (1935), which considered and rejected the validity of a statute assessing 50% of grade-separation costs upon the railroad. Justice Brandeis, on appeal from the Supreme Court of Tennessee, writing the opinion of the Court, said:

> The Supreme Court [of Tennessee] declined to consider the special facts relied upon as showing that the order, and the statute as applied, were arbitrary and unreasonable; and did not pass upon the question whether the evidence sustained those findings. It held that the statute was, upon its face, constitutional; that when it passed the state had, in the exercise of its police power, authority to impose upon railroads one-half of the costs of eliminating existing or future grade crossings; and that the Court could not "any more" consider "whether the provisions of the act in question have been rendered burdensome or unreasonable by changed economic and transportation conditions," than it "could consider changed mental attitudes to determine the constitutionality and enforceability of a statute." A rule to the contrary is settled by the decisions of this Court. A statute valid as to one set of facts may be invalid as to another. A statue valid when enacted may become invalid by change in the conditions to which it is applied. The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably.

cedures, etc. – all must be balanced in reaching a conclusion on the question of constitutionality.[23]

In the present case, it might be thought a sufficient demonstration of the denial of due process that the result of the proceedings was determined before the "hearing", rendering that hearing a charade.[24] The statement of policy of the Casino Control Commission was prepared in advance, was read into the hearing record before the argument began, and was adopted immediately after the argument concluded, without even a pause for deliberation.[25] Thus, it necessarily failed to address the contentions and alternative solutions proffered by Appellant.

The Casino Control Commission conceded at the "hearing" that the 50% figure it had selected for its market showing formula was arbitrary.[26] The 50% figure is not supported by a scintilla of evidence, finding or rationale.[27] The point is not that a precise figure must be so supported. Legislatures may adopt 14, 16 or 18 as the "age of consent" for the purpose of a statutory rape prohibition, as an effort to approximate the onset of sexual maturity; but the adop-

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[23] *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Cunningham v. Department of Civil Serv.*, 69 N.J. 13, 350 A.2d 58 (1975). *See* DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L.REV. 262 (1979) (hybrid rule-making and appropriate judicial review to assure that the administrative agency takes a "hard look").

[24] *Cf. National Rifle Assoc. of America v. United States Postal Serv.*, 407 F. Supp. 88 (D.D.C. 1976).

[25] Indeed, the statement of policy of the Casino Control Commission had been drafted and distributed a full six months prior to the hearing date. Compare Appendix, pp. A107a-A109a and Appendix, pp. A61a-A64a.

[26] *See, e.g.*, Appendix, pp. A40a-A41a and Appendix, pp. A71a-A72a.

[27] *Cf.* Appendix, pp. A10a-A11a.

tion of 35 as the appropriate "age of consent" would be clearly arbitrary. Capacity to vote or to make a will or a contract may be associated with a specified appropriate age. But a 50% regulation conforms to no rationale. As argued below, 50% is far more than could be justified even to afford Appellant's competitors a "showcase". In all events competitors already possessed a not insubstantial market share. No attempt was made to justify the 50% figure as related to optimal scale of operations. The Casino Control Commission and the Court below were totally unresponsive even to the economic argument that an artificially created duopoly, such as might well result from 50% market-sharing, would do little or nothing to promote more effective competition.

The Casino Control Commission and the Court below could not, consistent with the Due Process and Supremacy Clauses of the Federal Constitution, treat disputed issues, *e.g.*, "market domination", and the existence, scope and nature of actual and potential competition, as "undisputed facts."[28]

The Casino Control Commission and the Court below could not, consistent with the Due Process and Supremacy Clauses of the Federal Constitution, ignore evidence that the 50% rule was inspired by competitive suppliers, since the question of "state action" cannot be dissociated from the question of what interests initiated the "state action" and benefit from it.[29] It was established that the 50% rule originated in a disingenuous proposal by a proposed casino licensee which contemplated acquisition of one of Appel-

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[28] Appendix, p. A9a.

[29] *See United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), cert. denied, 445 U.S. 903 (1980). *Cf. Hertz Drivurself Stations, Inc. v. Siggins*, 359 Pa. 25, 58 A.2d 464, 477-78 (1948).

lant's competitors in the slot machine industry.[30] In addition it was noteworthy that no casino interests, *i.e.*, customers, appeared at the hearing to support the Casino Control Commission's proposed regulation purporting to protect them. On the contrary, casinos filed statements explaining their business preference for Appellant's machines,[31] and unsuccessfully sought exemption from the 50% requirement.[32]

Neither the Casino Control Commission nor the Court below paid the slightest attention to Appellant's proposal of alternative regulations that would address the agency's concerns but with less restraint on competition and less conflict with federal law and policy.[33]

Whatever the law may be as to the power of a state to *override* the antitrust laws, even without the aid of a constitutional amendment remitting virtually full control to the states as the 21st Amendment does for intoxicating liquors,[34] it surely is not the law that the states may *disregard* federal law in legislation on gaming.

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[30] *See, e.g.*, Appendix, pp. A39a-A40a and A117a-A118a.

[31] *See, e.g.*, Appendix, pp. A128a-A132a and A133a-A134a.

[32] *See, e.g.*, Appendix, pp. A42a-A48a.

[33] *See, e.g.*, Appendix, pp. A135a-A138a and A125a-A126a.

[34] *But cf. Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (Commerce Clause immunity from state control of tax-free liquor sales at international airport not repealed by 21st Amendment); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945).

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this Appeal.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF NEW JERSEY
A-50 September Term 1980

BALLY MANUFACTURING CORPORATION,
a Delaware Corporation,
Appellant,
v.
NEW JERSEY CASINO CONTROL COMMISSION,
Respondent.

Argued December 1, 1980 – Decided March 17, 1981

On certification to the Casino Control Commission.

Louis B. Schwartz, a member of the Pennyslvania bar, argued the cause for appellant (*Sills, Beck, Cummis, Radin & Tischman,* attorneys; *Clive S. Cummis, Louis B. Schwartz* and *Robert A. Goodman,* a member of the Ohio bar, of counsel; *Jerald D. Baranoff,* on the brief).

R. Benjamin Cohen argued the cause for respondent (*R. Benjamin Cohen,* General Counsel, attorney; *John S. Redden,* Assistant Counsel, on the brief).

Laurel A. Price, Deputy Attorney General, argued the cause for *amicus curiae* Attorney General of New Jersey (*John J. Degnan,* Attorney General of New Jersey, attorney; *Laurel A. Price* and *Robert J. Clark,* Deputy Attorneys General, on the brief).

The opinion of the Court was delivered by SULLIVAN, J.

This appeal by Bally Manufacturing Corporation (Bally) presents the question of the legality of a regulation adopted by the New Jersey Casino Control Commission (Commission) which, in substance, prohibits a licensed casino from acquiring more than 50% of its slot machines from any one manufacturer. *N.J.A.C.* 19:46-1.32.[1] Bally is directly affected by the regulation since it manufactures approximately 80% of the slot machines used in the United States.

Bally's basic contentions on appeal are that the regulation is beyond the power and authority given the Commission under the Casino Control Act, *N.J.S.A.* 5:12-1 *et seq.*, violates the Sherman Act, 15 *U.S.C.* § 1, and the New Jersey Antitrust Act, *N.J.S.A.* 56:9-1 *et seq.*, and is arbitrary and in violation of established principles of due process and equal protection. It is further contended that Bally was denied an evidentiary hearing in the matter in violation of the Administrative Procedure Act, *N.J.S.A.* 52:14B-1 *et seq.*, and contrary to principles of administrative due process and fundamental fairness.

The following background is pertinent to consideration of the issues presented.

In 1976, Art. IV, § 7, par. 2 of the New Jersey Constitution was amended to make it lawful for the Legislature to authorize by law the establishment and operation, under regulation and control by the State, of gambling houses or casinos in Atlantic City. Pursuant thereto, the Legislature enacted the Casino Control Act under which the New Jersey Casino Control Commission was created with power to license, supervise and control casino gambling in Atlantic City. The act vests broad power over casino

[1] A casino's compliance with this limitation is conditioned on the availability of a sufficient number of suitable slot machines.

operations in the Commission which is authorized to adopt regulations, consistent with the policy and objectives of the act, as it deems necessary or desirable for the public interest in carrying out the provisions of the act. *N.J.S.A.* 5:12-69.

Declaring what the public policy of the State is with regard to casino operations, the act, *inter alia*, states:

> An integral and essential element of the regulation and control of such casino facilities by the State rests in the public confidence and trust in the credibility and integrity of the regulatory process and of casino operations. To further such public confidence and trust, the regulatory provisions of this act are designed to extend strict State regulation to all persons, locations, practices and associations related to the operation of licensed casino enterprises and all related service industries as herein provided. In addition, licensure of a limited number of casino establishments, with the comprehensive law-enforcement supervision attendant thereto, is further designed to contribute to the public confidence and trust in the efficacy and integrity of the regulatory process.
>
> [*N.J.S.A.* 5:12-1(b)(6)]

> Since the economic stability of casino operations is in the public interest and competition in the casino operations in Atlantic City is desirable and necessary to assure the residents of Atlantic City and of this State and other visitors to Atlantic City varied attractions and exceptional facilities, the regulatory and investigatory powers and duties conferred by this act shall include the power and duty to regulate, control and prevent economic concentration in the casino operations and the ancillary industries regulated by this act, and to encourage and preserve competition.
>
> [*N.J.S.A.* 5:12-1(b)(12)]

In the main, it is the construction of the provisions of paragraph (12), principally those referring to the power and duty of the Commission to "*prevent economic concentration* in the casino operations and the ancillary indus-

tries regulated by this act, and *to encourage and preserve competition,*" that is at issue in this appeal. *N.J.S.A.* 5:12-1(b)(12) (emphasis added). It is undisputed that Bally is a casino service industry subject to regulation under the act. *N.J.S.A.* 5:12-12.

In the course of carrying out its statutory responsibilities, it came to the attention of the Commission that a substantial amount of casino revenues, estimated to be between 40 and 50%, are derived from slot machines. One report submitted to the Commission stated that slot machines "are the cornerstone" of casino operation. The Commission also learned that one manufacturer dominated the domestic slot machine market, accounting for at least 80% of all sales in the United States. This fact caused the Commission concern that market dominance in such a vital area of casino operations was the type of economic concentration that the Casino Control Act sought to prevent. Accordingly, on December 20, 1978, it proposed a regulation which, in substance, prohibited any casino from acquiring more than 50% of its slot machines from any one manufacturer.[2]

The proposed regulation was published in the New Jersey Register as required by the Administrative Procedure Act. 11 *N.J.R.* 108 (1979). Multiple letters, comments and memoranda were received by the Commission in response to this publication. Bally requested an evidentiary hearing, but was advised by letter that the Commission would consider the proposed regulation under its rule making authority and would be acting in its quasi-legislative capacity. The letter stated that presentation of factual testimony through witnesses would be inappropriate but that arguments of counsel would be permitted.

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[2] On December 15, 1978, Bally, aware of the Commission's contemplated action, had submitted its own proposed regulation to the Commission which did not contain any percentage limitation on slot machine purchases by any one casino.

The proposed regulation was considered by the Commission on June 20, 1979 at a public hearing. Counsel for the respective interested parties, including Bally, were heard on the need for and the legality of the proposed regulation. One of the matters discussed was whether a factual basis had to be established for whatever percentage was fixed. After considering the material submitted and hearing argument in the matter, the Commission adopted the proposed regulation by unanimous vote. The regulation was then forwarded to and filed by the Secretary of State on June 28, 1979. It provides as follows:

> (a) Unless otherwise approved by the Commission, no more than 50% of the slot machines used in any casino in this State to conduct gaming shall have been manufactured by any one manufacturer or by any enterprise under the direct or indirect control of said manufacturer.
>
> (b) The Commission may modify the said limitation of subsection (a) of this section upon a finding that the casino licensee or applicant for a casino license has made a good faith effort to seek out and obtain slot machines from more than the single manufacturer and that a number of adequate slot machines sufficient to comply with the said limitation are not reasonably available for such use in the said casino.
>
> (c) A casino licensee or an applicant for a casino license may seek modification of the limitation of subsection (a) of this section by filing a verified petition with the Commission alleging sufficient facts to satisfy the standards set forth in subsection (b) of this section.
>
> (d) In response to such a verified petition, the Commission may decide the request summarily, elicit further information from the petitioner or other interested persons, set the matter down for a hearing or adopt such other procedure as may be appropriate under the circumstances.
>
> [*N.J.A.C.* 19:46-1.32]

Shortly thereafter Bally filed a Notice of Appeal and a motion for direct certification. This Court granted Bally's motion on May 29, 1980. 84 *N.J.* 447 (1980).

Bally argues that the regulation is invalid because the Casino Control Act does not authorize the Commission to fix mathematical market shares. It points out that the act, which it describes as "one of the most comprehensive pieces of industry legislation in effect in New Jersey," specifies percentages and fixed numbers in numerous areas where it intended that they be used. According to Bally, had the Legislature intended to impose an arithmetical quota upon the sale of slot machines, it would have supplied the desired percentage or, at the very least, indicated that a percentage limitation was desired. Bally also contends that the statutory powers given the Commission to prevent economic concentration and encourage and preserve competition, relate only to the well established principle of "monopoly" in antitrust law. It argues that mere market leadership resulting from customer preference is not contemplated by the act and, consequently, may not be regulated by the Commission absent a showing of predatory practices.

We find Bally's contentions lack merit. The act specifically provides that "casino operations are especially sensitive and in need of public control and supervision." *N.J.S.A.* 5:12-1(b)(9). Such regulation necessarily requires the exercise of comprehensive power over not only casinos themselves but also over "all related [casino] service industries." *N.J.S.A.* 5:12-1(b)(6). Accordingly, the act expressly requires the Commission to include, in its regulations, provisions "[g]overning the manufacture, distribution, sale, and servicing of gaming devices and equipment." *N.J.S.A.* 5:12-70(i).

In prohibiting "economic concentration" in the casino industry, the Legislature was concerned with the *fact* of economic concentration in casino operations. Its intent was

to prevent economic domination in any area related to the industry. As noted, slot machines are vital to gambling operations. If one manufacturer were permitted to dominate this field, casinos would be largely dependent on one source of supply not only for the purchase of machines but also for replacement parts and servicing. Such economic power would have the clear potential for unfair advantage.[3] In addition, chaos in casino operations could result if this one manufacturer ever ceased to be a supplier because of economic difficulties or loss of its manufacturer's license. Therefore, our conclusion is that the regulation in question is within the framework of the broad powers conferred on the Commission by the act.

Bally next argues that the Commission's action was knowingly and purposefully targeted against Bally as the one entity affected by the regulation. Since the Commission enactment allegedly singled out one entity for special restriction, Bally submits that it was entitled to the evidentiary hearing it had previously rquested. In advancing this argument, Bally relies on the hearing provisions in the Administrative Procedure Act, *N.J.S.A.* 52:14B-1 *et seq.*, as well as principles of administrative due process and fundamental fairness.

The Casino Control Act requires that Commission regulations "shall be adopted, amended, and repealed in accordance with the provisions of the 'Administrative Procedure Act.'" *N.J.S.A.* 5:12-69(b). Prior to the adoption of an administrative rule by an agency, the Administrative Procedure Act requires 20 days public notice of the intended action with reasonable opportunity for all interested persons to submit data, views, or arguments, orally or in writing. *N.J.S.A.* 52:14B-4. It is undisputed that the

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[3] The situation would be aggravated in this particular case because Bally is also a casino licensee. Were its position sustained, it would control the source of supply, maintenance and repair of slot machines used by its casino competitors.

Commission complied with this requirement. Bally, however, contends that the matter should be governed by the provisions for notice and hearing in contested cases, which include the opportunity to present evidence. *N.J.S.A.* 52:14B-9(c). The Administrative Procedure Act defines "contested case" as

> a proceeding . . . in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing.
>
> [*N.J.S.A.* 52:14B-2(b)]

Bally maintains that since it was the target of the regulation and the only manufacturer whose rights were affected by the proposed Commission action, it was entitled to the evidentiary hearing on the basis not only of *N.J.S.A.* 52:14B-9(c) but also by principles of fair play and administrative due process.

In this regard, Bally lists a number of alleged factual issues before the Commission with respect to which it contends that it should have been allowed to present evidence. In essence though, Bally's argument is that it was entitled to a hearing on the question whether its "market leadership" was achieved through the quality of its product and customer preference rather than as a result of predatory practices. Bally charges that it did not have the advantage of hearing the evidence concerning its market leadership, or of learning the precise factual findings upon which the agency based its decision to restrict slot machine sales.

Bally misconstrues the purpose of the regulation. It is not directed at Bally. The restriction applies to any manufacturer who, for whatever reason, occupies a dominant position in the slot machine market in New Jersey.

At present, Bally is in that position but should another manufacturer develop an improved type of machine with strong market appeal,[4] the regulation would apply equally to that producer.

The Commission's action was founded on certain basic facts which were not in dispute: (1) the slot machine market was dominated by one manufacturer, (2) there was an absence of significant competition in the sale of slot machines, and (3) slot machines are an important source of casino revenues. In light of these facts, the Commission was obligated to take action to prevent "economic concentration" in the slot machine market and to "encourage and preserve competition." The Commission was not interested in the reasons for the then existing situation in such a sensitive industry. It was the *fact* of market domination and the resultant "economic concentration" which concerned the Commission. Therefore, this was not a contested case requiring an evidentiary hearing and findings of fact. It was, as Bally was advised, an exercise of the Commission's rule making authority. See *Heir v. Degnan*, 82 *N.J.* 109, 119 (1980). Since the regulation was not "directed" at Bally, as previously noted, but was rather a policy decision based on undisputed facts, principles of fair play and administrative due process did not require the evidentiary hearing mandated in *Cunningham v. Dept. of Civil Service*, 69 *N.J.* 13 (1975).

The fact that a proposed administrative rule or regulation will have a substantial impact on a particular entity does not, standing alone, require a trial type hearing as a matter of due process. Only where the proposed administrative action is based on disputed adjudicative facts is an evidentiary hearing mandated. *Cunningham v. Dept.*

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[4] At the June 20, 1979 hearing before the Commission, the attorney for another slot machine manufacturer referred to "a new and quite refined machine" which this manufacturer proposed to introduce into New Jersey.

of Civil Service, supra. Professor Davis, in discussing the requirements for an evidentiary hearing in his treatise on administrative law states: "Due process never requires a trial on non factual issues. What is needed on such issues is argument, written or oral, not evidence, and not trial procedure." 2 *Davis, Administrative Law Treatise,* §12.1 at 406 (2d ed. 1979). Addressing the question whether one who has vital interests involved in an administrative proceeding is for that reason entitled to the protection of trial procedure via an evidentiary hearing, Professor Davis adds:

> The proposition stated in the title of this section is obvious but has to be stated because a good deal of law that bears on the proposition is confused. Some courts tend to assume that one who has vital interests at stake in a controversy is for that reason entitled to the protection of trial procedure, whether or not facts are in dispute.
>
> The law clearly is, at a most elementary level, that because a trial is a process for taking evidence subject to cross-examination, and because taking evidence is not appropriate except on disputed facts, trial procedure is not required on issues of law, policy or discretion.
>
> [2 *Davis, supra,* §12.2 at 409-410]

This is precisely the situation in the instant case. As we have noted, the Commission's action was founded on basic undisputed facts. Applying these facts in light of its statutory obligation to prevent economic concentration in such a sensitive and important area of the gambling industry, the Commission, after complying fully with the requirements of the Administrative Procedure Act, adopted the policy expressed in *N.J.A.C.* 19:46.1-32.

Bally further contends that, at the very least, the Commission should have established some basis for the 50% limitation and afforded the manufacturer an opportunity to challenge that basis and present countervailing

proofs. Absent such an opportunity, Bally claims the 50% limitation is arbitrary and a denial of due process.

As heretofore noted, an evidentiary hearing is not called for by the rule making process. Nor are findings of fact, sufficient to justify the regulations, a required part of the same process. *Heir v. Degnan, supra,* at 119. Admittedly, the selection of any percentage restriction is arbitrary in a sense. A rational basis, however, for the 50% limitation clearly exists. The Commission had a mandate to prevent economic concentration in any and all areas of casino operation. Recognizing that the slot machine industry was dominated by one manufacturer which controlled at least 80% of all slot machine sales, the Commission concluded that this constituted undue economic concentration in an important area of casino operation. To prevent this concentration of economic power, the Commission imposed a 50% limitation on the number of slot machines which a casino could acquire from *any* one manufacturer. While the Commission did not articulate the basis for this percentage, it is clear that the Commission concluded that for any one manufacturer to control more than one-half of the slot machine market in Atlantic City constituted economic concentration within the meaning of the act. The percentage fixed, therefore, has a rational basis. Moreover, the regulation remains subject to modification and change in the light of the Commission's experience with it. Should it prove to be unworkable, unfair or unnecessary, it will be the obligation of the Commission to take appropriate corrective action.

Bally's final argument is that the regulation violates state and federal antitrust laws. The contention that the regulation offends the New Jersey Antitrust Act, *N.J.S.A.* 56:9-1 *et seq.*, is misplaced as that statute by its own terms does "not apply to any activity directed, authorized or permitted by any law of this State." *N.J.S.A.* 56:9-6(c). Since we have concluded that the regulation in question

is authorized and permitted by the Casino Control Act, the exemption provision of the New Jersey Antitrust Act, therefore, comes into play. *New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 *N.J.* 544, 564 (1978).

Whether the regulation runs afoul of the Sherman Act, 15 *U.S.C.* §1 *et seq.*, presents a different question. Restraints on trade and competition are illegal under the Sherman Act. The United States Supreme Court, however, has established a "state action" exception to the applicability of the Sherman Act. In the seminal decision of *Parker v. Brown*, 317 *U.S.* 341, 63 *S. Ct.* 307, 87 *L. Ed.* 315 (1943), it was held that state regulatory programs were immune from the provisions of the Sherman Act as the Court did not find in that act any legislative purpose to nullify state powers since the act was directed against "individual and not state action." 317 *U.S.* at 352, 63 *S. Ct.* at ....., 87 *L. Ed.* at 326.

Subsequent decisions, upholding the ruling in *Parker v. Brown*, have refined the standards for finding antitrust immunity for state action. See, *e.g.*, *Goldfarb v. Virginia State Bar*, 421 *U.S.* 773, 95 *S. Ct.* 2004, 44 *L. Ed.* 2d 572 (1975); *Cantor v. Detroit Edison Co.*, 428 *U.S.* 579, 96 *S. Ct.* 3110, 49 *L. Ed.* 2d 1141 (1976); *Bates v. State Bar of Arizona*, 433 *U.S.* 350, 97 *S. Ct.* 2691, 53 *L. Ed.* 2d 810 (1977); *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 439 *U.S.* 96, 99 *S. Ct.* 403, 58 *L. Ed.* 2d 361 (1978). The United States Supreme Court most recently reviewed the *Parker v. Brown* doctrine in *California Liquor Dealers v. Midcal Aluminum*, ... *U.S.* ....., ... *S. Ct.* ....., 63 *L. Ed.* 2d 233 (1980). Considering the development of that doctrine in the subsequent decisions regarding antitrust immunity for state action, the Court in *Midcal* stated:

> These decisions establish two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be "one clearly articulated and affirma-

tively expressed as state policy"; second, the policy must be "actively supervised" by the State itself.

[_____ *U.S.* at _____, _____ *S. Ct.* at _____, 63 *L. Ed.* 2d at 243 (citation omitted)]

Reviewing the facts of the instant case, we conclude that these standards have been fully satisfied so that the regulation falls within the antitrust immunity established by *Parker v. Brown* and its progeny. First, as we have already held, the regulation is clearly authorized, indeed required, by the expression of State policy contained in the Casino Control Act. *N.J.S.A.* 5:12-1(b)(6) & (12). Second, there is no question but that this policy is actively supervised by the State itself. The Casino Control Commission has been established as a state agency to regulate not only casinos, but also casino service industries of which Bally is one. In short, the two-prong test set forth in *Midcal* clearly has been met.[5]

Finding no merit in any of the issues raised by Bally on appeal, we conclude that *N.J.A.C.* 19:46-1.32 constitutes a proper exercise, by the Casino Control Commission, of its rule making authority. The validity of that regulation is therefore affirmed.

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[5] Argument could well be made that the effect of the regulation is actually to promote competition rather than restrain it.

Justices Clifford, Schreiber and Pollock join in this opinion.

Justice Handler has filed a separate concurring opinion.

Justice Pashman has filed a separate dissenting opinion.

Chief Justice Wilentz did not participate.

SUPREME COURT OF NEW JERSEY
A-50 September Term 1980

BALLY MANUFACTURING CORPORATION, a Delaware Corporation, *Appellant*,

v.

NEW JERSEY CASINO CONTROL COMMISSION, *Respondent*.

HANDLER, J., concurring.

I concur in the opinion of the majority of the Court. I write separately to emphasize certain principles of administrative law relating to the rulemaking authority of administrative agencies. These principles, which underlie today's decision upholding the actions of the Casino Control Commission, are codified in our Administrative Procedure Act, *N.J.S.A.* 52:14B-1 *et seq.*, and its legislative progeny creating the Office of Administrative Law, *N.J.S.A.* 52:14F-1 *et seq.*

Most administrative agencies, in the discharge of their regulatory responsibilities, are empowered to make determinations by either promulgating a "rule" or rendering an "adjudication." This authority must be exercised in accordance with the standards of the Administrative Procedure Act (APA). *N.J.S.A.* 52:14B-1 *et seq.*

The Casino Control Commission is fully subject to the strictures of the APA. *N.J.S.A.* 5:12-69(b); *N.J.S.A.* 5:12-107(a). Under the APA, an "adjudication" is a "final determination, decision or order rendered in a contested

case." *N.J.S.A.* 52:14B-2(c). The APA defines a "contested case" as

> a proceeding ... in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing.
>
> [*N.J.S.A.* 52:14B-2(b)]

A "rule" is an "agency statement of general applicability and continuing effect that implements or interprets law or policy or describes the organizational procedure or practice requirements of any agency." *N.J.S.A.* 52:14B-2(e).

Administrative agencies enjoy a great deal of flexibility in selecting the proceedings most suitable to achieving their regulatory aims. This is contemplated by the law that created the Office of Administrative Law, *N.J.S.A.* 52:14F-1 *et seq.*, supplementing the APA, and is provided with particularity in the rules adopted under this legislation. *N.J.A.C.* 1:1-1.4 to 1.7; 1:1-2.2(c) (June 19, 1980). That choice is ordinarily made in terms of whether a particular matter is to be classified by the agency as a "contested case." Thus *N.J.S.A.* 52:14F-7(a) states that "nothing in this ... act shall be construed to deprive the head of any agency of the authority pursuant to section 10 of P.L. 1968, c. 410 (C. 52:14B-10) to determine whether a case is contested." See also *N.J.A.C.* 1:1-1.4, n.1 which underscores this, *viz*:

> L.1978, c.67, amending the Administrative Procedure Act and establishing the Office of Administrative Law to conduct hearings in contested cases provides, in § 9 (*N.J.S.A.* 52:14F-7), that it is the prerogative of the agency heads "to determine whether a case is contested ..." It is the statutory obligation of the Director of the Office of Administrative Law, inter alia, to "develop uniform standards ... (regu-

lating) the conduct of contested cases and the rendering of administrative adjudications" (*N.J.S.A.* 52:14F-5e) and to "advise agencies concerning their obligations under the Administrative Procedure Act. . . ." (*N.J.S.A.* 52:14F-5h).

Indeed, additional procedural choices are available in the form of declaratory rulings and advisory opinions, *N.J.S.A.* 52:14B-8; *N.J.A.C.* 15:15-9.1, -9.8, which illustrate further the flexibility reposed in agencies to enable them to effecuate fully their administrative aims. The most basic procedural choice in agency proceedings, however, is between rulemaking and adjudication. That decision is, of course, subject to broad guidelines which are derived from judicial decisions, see, *e.g.*, *Cunningham v. Dept. of Civil Service*, 69 *N.J.* 13 (1975) and statute, see *N.J.S.A.* 52:14B-2(b), (e), as well as administrative regulations, see *N.J.A.C.* 1:1-1.4 to 1.7.

These provisions and guidelines recognize the important authority placed in administrative agencies in fulfilling their regulatory responsibilities. The procedural choice as between adjudication and rulemaking is an aspect of that delegated authority and lies within the informed discretion of administrative agencies. These considerations, therefore, strongly counsel judicial deference to the administrative choice between adjudication and rulemaking.[1]

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[1] The provision for agency determination in classifying proceedings as between a contested case which entails adjudication and a case to be resolved through rulemaking is parallel to federal administrative agency practice and mirrors the rule of discretionary choice embedded in federal administrative law. See *SEC v. Chenery*, 332 *U.S.* 194, 67 *S.Ct.* 1575, 86 *L.Ed.* 1995 (1947), rehearing denied 332 *U.S.* 783, 68 *S.Ct.* 26, 92 *L.Ed.* 367 (1947); David L. Shapiro, "The Choice of Rulemaking or Adjudication in the Development of Administration Policy," 78 *Harv. L. Rev.* 921 (1965). Of course these

The significance of the choice between rulemaking and adjudication is that it affects the procedure that must be followed in reaching an ultimate agency determination. In particular, as crystallized by the contentions on this appeal, the choice between rulemaking and adjudication has important ramifications in terms of the kind of agency hearing that must be undertaken in the matter. Thus, the type of hearing required for purposes of developing an evidential foundation for the eventual agency disposition may differ markedly depending upon whether that disposition is rulemaking or adjudication.

In general terms an adjudication requires a trial-type hearing. This hearing is conducted by an administrative law judge (ALJ), *N.J.S.A.* 52:14F-5(n), except in those contested cases where the hearing function has not been delegated by the head of the agency, *N.J.S.A.* 52:14F-8(b). That kind of hearing ordinarily entails the production of competent evidence, frequently testimonial in character, and contemplates the right to confront adverse evidence, usually through cross-examination. In rulemaking, however, the "hearing" is not governed by strict procedural requirements or subject to conventional rules of evidence. Frequently, the proceedings permit the incorporation of or reference to evidence developed outside the agency proceedings or the written submissions by interested

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federal principles are not binding on this Court's interpretation of the New Jersey act. We are not today presented with a situation which calls for us to evaluate any federal principles which may be discordant with the aims and wording of our own statutory enactment. Nevertheless, it is well to note that in New Jersey a high degree of discretion in making the appropriate procedural choice lies with the administrative agency itself, *N.J.S.A.* 52:14F-7, *N.J.S.A.* 1:1-2.2(a), and that discretion in these matters is also reposed in the Office of Administrative Law. *N.J.A.C.* 1:1-2.2(c).

parties, with or without the aid of an ALJ. Compare *N.J.S.A.* 52:14B-9, 10 and *N.J.S.A.* 52:14F-5(n) with *N.J.S.A.* 52:14B-4, 5 and *N.J.S.A.* 52:14F-5(o).[2]

Generally, adjudication is the preferred, if not required, mode where there exist disputed issues of fact which must be resolved in order to determine the rights, duties, obligations, privileges, benefits or other legal relations of specific parties. *N.J.A.C.* 1:1-1.5(a)(3), -1.6(a)(1). This may be especially true where the factual issues most suitably require trial-type procedures or strict rules of evidence for their proper resolution. Contrariwise, where the agency is concerned with "broad policy issues" affecting an entire field or industry, and the proposed final agency action is intended to be applied prospectively, "*in futuro*," rulemaking is the norm. *N.J.A.C.* 1:1-1.6(a)(3), -1.6(a)(7). And, in addition, where factual issues do not necessarily or reasonably require development and determination through adversary techniques or conventional evidence rules, rulemaking procedures are appropriate.

The selection between adjudication and rulemaking is based not only upon the form or effect of the final disposition such as the number of persons affected or its retroactive or prospective effect. The choice ultimately is a matter of which procedure is best tailored to achieve the goals and functions of the agency in the given case.

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[2] In this case, even if the choice by the Casino Control Commission were to proceed by way of adjudication, the hearing would not be required to be conducted by an administrative law judge. This, because the Commission has determined not to delegate the hearing function. The Commissioners, who are the decisional officers of the agency, have elected to conduct the hearing themselves. Hence, under *N.J.S.A.* 52:14F-8(b), the agency is presently exempt from the jurisdiction of the Office of Administrative Law and the assignment of an administrative law judge to conduct its hearings. See, *e.g.*, *In re Orange Savings Bank*, 172 *N.J. Super.* 275 (App. Div. 1980).

See *N.J.A.C.* 1:1-1.6(a)(3). These objectives can include, for example, investigative factfinding, gathering general information, reconciling conflicts, resolving disputes, developing continuity, rendering advice, achieving clarity, providing flexibility, responding quickly to a particular situation, or acting emergently. See generally, David L. Shapiro, "The Choice of Rulemaking or Adjudication in the Development of Administrative Policy," 78 *Harv. L. Rev.* 921 (1965). Thus, the procedural policy selection – adjudication or rulemaking – must be responsive to the overall agency purpose and function in the context of the particular case, subject of course to the general judicial and legislative guidelines governing administrative agency proceedings.[3]

In the matter at hand, Bally Manufacturing Corporation argues that the Casino Control Commission acted beyond the limits of its discretion in proceeding by rulemaking instead of adjudication. Bally bases its position on the ground that it was the target of the regulation and the only manufacturer whose rights were affected by the proposed Commission action. It contends that the rights and privileges of a "specific" party were determined, bringing the proceedings within the APA definition of a "contested case," *N.J.S.A.* 52:14B-2(b), and obligating the agency to proceed in the adjudicative mode.

Although facially attractive, such contentions are overinclusive and ignore the extent to which an administrative rulemaking proceeding may itself be honed so as to adjust to the exigencies of a given situation. Thus even though one party would be specifically affected by the proposed rule, it does not necessarily follow that the preferred proceeding be adjudication rather than rulemaking. There

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[3] Although not done in this case, it would be prudent for an agency to provide a written explanation or statement of reasons for its procedural policy choice. *Cf. N.J.A.C.* 1:1-2.2(c).

can be rulemaking that originates with and involves a specific party.

Such a concept of specific rulemaking, as a specialized subset of rulemaking in general, is well established in the lexicon of federal administrative law. See 5 *U.S.C.A.* § 551(4). See also, *e.g.*, *Law Motor Freight, Inc. v. C.A.B.*, 364 *F.*2d 139, 142-143 (1 Cir. 1966); *Anaconda Co. v. Ruckelshaus*, 482 *F.*2d 1301, 1306-1307 (10 Cir. 1973); *PBW Stock Exchange, Inc. v. S.E.C.*, 485 *F.*2d 718, 731-733 (3 Cir. 1973), *cert.* den. 416 *U.S.* 969, 40 *L.Ed.*2d 558, 94 *S.Ct.* 44 (1975); *Hercules, Inc. v. E.P.A.*, 598 *F.*2d 91, 118 (D.C. Cir. 1978). See generally Davis, *Administrative Law Treatise* § 5.02 (1958); Davis, *Administrative Law Treatise* §§ 6.38, 7.2 (2d ed. 1979); Note, 87 *Harv. L. Rev.* 782, 785-790 (1974). *Cf. U.S. v. Florida East Coast Railway Co.*, 410 *U.S.* 224, 244-246, 93 *S.Ct.* 810, 820-821, 35 *L.Ed.*2d. 223, 239-240 (1973); *American Airlines, Inc. v. C.A.B.*, 359 *F.*2d 624, 630-631 (D.C. Cir. 1966) (*en banc*), *cert.* denied 385 *U.S.* 843, 87 *S.Ct.* 73, 17 *L.Ed.*2d 75 (1966). The federal experience, though much more extensive, is not wholly alien to this jurisdiction. An agency determination to proceed in its role as legislator by promulgating a rule, rather than its role as a court by adjudicating, even where a specific party is specially involved, has a sound basis in New Jersey administrative law, *N.J.A.C.* 1-1.7(a)(3) ("matters which will affect the rights of a specific party, but where there is neither a statutory nor a constitutional right to an adjudicatory hearing, . . . are not contested"), see also *Boller Beverages, Inc. v. Davis*, 38 *N.J.* 138, 151-152 (1962) (tentatively recognizing a category of special rulemaking), and in the legislative analog to specific rulemaking, special legislation, see, *e.g.*, *Hudson Circle Servicenter, Inc. v. Kearney*, 70 *N.J.* 289, 316 (1976) (legislation valid even though only one party is affected, as long as classification has a rational relationship to the

purposes of the enactment). Thus, a rulemaking choice to govern particular proceedings is valid even where specific in its impact, if enough other characteristics endemic to rulemaking are present.

Here, the proceedings of the agency have the essential features of legislation necessary for rulemaking to be a valid procedural choice. The rule promulgated by the Casino Control Commission has future or prospective effect. It does not purport to resolve an extant dispute or determine adversary claims. It does not constitute a disposition of particular interests through a retroactive determination. See *N.J.A.C.* 1:1-1.5(a)(3); *N.J.A.C.* 1:1-1.6(a)(4) through 1.6(a)(9); *N.J.A.C.* 1:1-1.7(a)(2) through 1.7(a)(4). The rule is worded generally and could impact directly upon others. Many entities are potentially as well as actually affected – companies which may develop and manufacture an improved slot machine with a strong market appeal, the casino industry and the public in general. The general classification is genuine and not a sham. Moreover, the subject matter of the proceeding is complex, technical and highly sensitive, involving difficult regulatory and economic determinations which are likely best developed through the flexible process that is rulemaking. See *N.J.A.C.* 1:1-1.6(a)(3), -1.7(a)(4), -1.7(a)(5). Therefore the administrative determination to employ the procedural policy choice of specific rulemaking is reasonable, sound and valid.

The validity of the procedural policy choice, however, does not end the inquiry posed in this case. While a full blown hearing in the adjudication sense may not be required, the agency must still determine the appropriate type of hearing that is to be conducted within the relevant procedural mode selected. Thus, even though the procedural choice, as here, involved rulemaking, the hearing procedures to be followed must still be ascertained and

settled.[4] The hearing requirements are to be determined not only as a matter of statutory right, but by evaluating the objectives to be achieved, the interests that are affected by the contemplated regulation and the evidential foundation that must reasonably be developed as a predicate to valid agency action. These considerations implicate principles of fair play and administrative due process and they are relevant in rulemaking proceedings just as in adjudicatory proceedings, although the contours of the fairness standards may differ.

As earlier noted, in the hearing of a contested case involving adjudication in its classic sense certain procedural

[4] *N.J.A.C.* 1:1-1.6(a)(3) reflects this approach. It recognizes, for example, that even though a case may be fairly classified as "contested" and amenable to adjudication, it may also partake of features that are uncontested in the sense they are "quasi-legislative" and suspectible of "rulemaking." In that hybrid situation the agency proceeding may involve dual approaches. The rule states:

> Contested cases resolve questions relating to the rights, entitlements, and obligations of specific parties even in large, but defined, groups. They do not deal with broad policy issues affecting entire industries or large and undefined classes of people. In some instances an agency's matters may be contested cases (judicial) in part and uncontested cases (legislative or regulatory) in part. It is necessary in each such matter to determine whether the issues can be fruitfully separated or whether the needs of fairness, efficiency, and thoroughness require the issues to be handled in a single, integrated proceeding.

The case here arguably involves the converse situation to that described in *N.J.A.C.* 1:1-1.6(a)(3), namely, one in which a matter is essentially uncontested in the sense that it is quasi-legislative or involves rulemaking but also has certain aspects that reasonably require adjudicative procedures for their proper resolution. While this kind of agency matter is within the contemplation of the APA and the rules of the OAL, for the reasons set forth in the majority opnion, as well as in this concurrence, the present case does not call for the hybridization of adjudicative and rulemaking procedures but, rather, the rulemaking procedures that were actually employed by the agency.

features must be present. These include reasonable notice, the right to present evidence and to confront adverse evidence, factual findings based upon sufficient and reliable evidence derived exclusively from the record, the opportunity to present argument on all major issues and a final decision similarly confined exclusively to the record. See *N.J.S.A.* 52:14B-9, 10; *N.J.A.C.* 15:15-10.2 to 10.6; *N.J.A.C.* 1.1-6.1 *et seq.* See generally *D.L.&W.R. Co. v. City of Hoboken*, 10 *N.J.* 418, 424 (1952) (findings of fact required); *In re Plainfield-Union Water Co.*, 11 *N.J.* 382, 389 (1953) (parties must have opportunity to refute adverse evidence); *Mazza v. Cavicchia*, 15 *N.J.* 498, 511 (1954) (establishing principle of exclusiveness of record); *Winston v. Bd. of Ed. of So. Plainfield*, 125 *N.J. Super.* 131, 138 (1973), aff'd 64 *N.J.* 582, 586 (1974) (secret hearing examiner's report invalid).

In contrast, the requirements for a hearing in the general rulemaking mode may be considerably different. The statute does not require more than written notice and the opportunity to comment by affected parties, see *N.J.S.A.* 52:14B-4, 5. It does not follow, however, that such broad or loosened hearing requirements will necessarily suffice in all rulemaking. When specific parties are particularly affected by a proposed rule, fair play and administrative due process dictate that an agency must conscientiously concern itself with and make reasonable efforts to accommodate the rights and interests of the affected individual and genuinely account for the individualized effect of its proposed action. *Boller Beverages, Inc. v. Davis, supra*, 38 *N.J.* 138; *Cunningham v. Dept. of Civil Service, supra*, 69 *N.J.* 13. See also *Philadelphia Co. v. S.E.C.*, 175 *F.*2d 808 (D.C. Cir. 1948), vacated as moot, 337 *U.S.* 901, 69 *S.Ct.* 1047, 93 *L.Ed.* 715 (1949); *American Airlines, Inc. v. C.A.B., supra*, 359 *F.*2d 624; *Walter Holm & Co. v. Hardin*, 449 *F.*2d 1009 (D.C. Cir. 1971); *Appalachian Power Co. v. E.P.A.*, 477 *F.*2d 495, 500-501 (4 Cir. 1973); Davis, *supra;* Note, *supra*, 87 *Harv. L. Rev.* at

785-790. *Cf. N.J.A.C.* 1:1-1.7(a)(3). See generally, Estreicher, "Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law, 80 *Columbia L. Rev.* 894, 909-926 (1980); Davis, "Facts in Lawmaking," 80 *Columbia L. Rev.* 931 (1980). This refinement of the principles applicable generally to rulemaking is exemplified by ratemaking procedures which, although rulemaking in mode, require an evidentiary hearing as part of the broader proceeding. See, *e.g., Public Service Coordinated Transport v. State*, 5 *N.J.* 196, 214 (1950). This is particularly true where the factual inquiry involves a subject matter that is controversial or unsettled or there are material and essential facts that are genuinely contested. *Cf. N.J.A.C.* 1:1-1.6(a)(1). The principle extends not only to the type of hearing but also to the thoroughness of the record that is to be developed. See, *e.g., United Hunters of N.J., Inc. v. Adams*, 36 *N.J.* 288 (1962). It is thus noteworthy that administrative law judges, who are especially skilled in the conduct of adjudicatory hearings, may also be employed in rulemaking proceedings. *N.J.S.A.* 52:14F-5(o).

Nevertheless, applying these principles to the matter at hand, the rulemaking procedure employed and followed by the Commission in this case was adequate, fair and proper. All that was reasonably necessary in the context of this case was for interested parties, even the party specifically affected, to be given an opportunity to present their positions. Nothing more than written presentations to the Casino Control Commission by Bally was required for the simple, yet cogent, reason, as fully explicated by the majority, *ante* at (slip op. at 11-14), that no material issue of fact existed for which an evidentiary hearing, a more thorough record, or further findings of fact could prove helpful or more fruitful in informing the agency as a basis for its ultimate determination.

These principles, I believe, underlie the opinion of the majority of the Court and I, therefore, join its decision.

SUPREME COURT OF NEW JERSEY

A-50 September Term 1980

BALLY MANUFACTURING CORPORATION, a Delaware Corporation, Appellant, v. NEW JERSEY CASINO CONTROL COMMISSION, Respondent.

PASHMAN, J., dissenting.

I am in general agreement with the majority's conclusions regarding the scope of the Commission's authority to prevent economic concentration and the exemption of the Commission's regulations from the Sherman Act. In implementing the policy announced in *N.J.S.A.* 5:12-1(b)(12), the Commission is not confined to addressing the kind of economic concentration proscribed by antitrust laws. Instead, the Commission may promulgate regulations designed to curb any economic concentration in the casino industry or ancillary service industries in New Jersey that threatens the economic stability of casino operations. Because the Commission is a State regulatory agency, any regulation that is validly promulgated under the Casino Control Act will be "state action" exempt from the scope of the Sherman Act.

In spite of my agreement on these issues, I must dissent from the majority's holding that Bally was not entitled to an evidentiary hearing before the Commission made its final decision. Since I would find the regulation invalid for lack of an adequate hearing, I decline to decide whether the fifty percent rule is arbitrary and capricious in violation of Bally's due process rights.

In reaching its conclusion that Bally was not entitled to an evidentiary hearing, the majority characterizes the Commission's action as "a policy decision based on undisputed facts" and concludes that the proceeding was rule making exempt from the requirement of an evidentiary hearing. Labeling the proceeding rule making only begs the question. The majority disregards the significance of facts which it apparently concedes: that the Commission was reacting to Bally's domination of the domestic slot machine market and that at present only Bally is adversely affected by the Commission's decision. When agency action directly affecting a single party masquerades as a general rule, I believe that principles of procedural due process require an evidentiary hearing.

Ordinarily, a rule making proceeding is directed at a general factual setting or a class of similarly situated persons. In such a case, an individual's complaint of hardship will not entitle him to an evidentiary hearing, *see Heir v. Degnan*, 82 *N.J.* 109, 119 (1980), and his interests will be subordinated to the welfare of the general public, *Willapoint Oysters v. Ewing*, 174 *F.*2d 676, 693 (9th Cir.), *cert.* denied, 338 *U.S.* 860 (1949). If every person adversely affected by a legislative act or agency rule had a right to a hearing, our form of government could not function. *See Bi-Metallic Investment Co. v. State Board of Equalization*, 239 *U.S.* 441, 445 (1915).

However, where agency action has an exceptional and immediate effect on a particular person, due process entitles the affected person to a hearing no matter what form of proceeding the agency chooses. *Philadelphia Co. v. Securities and Exchange Commission*, 175 *F.*2d 808 (D.C. Cir.), vacated as moot, 337 *U.S.* 901 (1949); *see Londoner v. Denver*, 210 *U.S.* 373 (1908); *Cunningham v. Department of Civil Service*, 69 *N.J.* 13 (1975). As a leading commentator has reasoned, the affected person "should

be entitled to a hearing, regardless of . . . the nature of the facts in dispute. . . . From the point of view of the individual concerned, . . . it is the fact that a judicial decision affects him particularly, upon individual grounds, that makes the decision of substantial impact. Even if agency action is legislative under the time test [in that it is prospective in application], if it is particular in its applicability, its effect is much the same as that of an adjudicatory decision." B. Schwartz, *Administrative Law* 204 (1976). Justice Handler has ably supported this principle in his concurring opinion. *Ante* at_____ (slip op. at 13-14).

Rate making proceedings are the most obvious illustration of this rule. Even though setting utility rates is a legislative rather than a judicial function, *Public Service Coordinated Transport v. State*, 5 *N.J.* 196, 214 (1950), when a public utility commission determines the rates that a particular company may charge, due process requires that the agency make its decision only after an evidentiary hearing. *Railroad Commission v. Pacific Gas & Electric Co.*, 302 *U.S.* 388, 393 (1938). This rule is incorporated into the administrative law of this State. *See N.J.S.A.* 48:2-21(b)

The right to an evidentiary hearing, routinely accepted in rate making proceedings, has also been recognized in other contexts where an agency rule exceptionally affects the interests of a single person or small group of persons. In *Philadelphia Co. v. Securities and Exchange Commission, supra*, the Securities and Exchange Commission issued an order changing the scope of an exemption from the requirements of the Public Utility Holding Company Act of 1953. At the time the rule became effective, Philadelphia Co. was the only company that would have been affected by the changed exemption. The Commissioner promulgated the rule after soliciting written comments and hearing oral arguments, but without affording Philadelphia Co. the evidentiary hearing the company had requested. The

Court of Appeals for the District of Columbia Circuit held that the Commission's rule was invalid for lack of an adequate hearing, including the right of the affected party to hear the Commission's evidence, cross-examine witnesses, and introduce evidence on its own behalf, as due process requires. *Id.* at 817. The court stated: "It is elementary that the action of an administrative tribunal is adjudicatory in character if it is particular and immediate, rather than, as in the case of legislative or rule making action, general and future in effect." *Id.* at 816. The Commission's order was particular, since it applied to Philadelphia Co. alone; and it was immediate in effect, because it would influence ongoing reorganization proceedings. As to other companies who in the future might come within the ambit of the order, the court noted that the rule might well be legislative in character. *Id.* at 817. Nevertheless, Philadelphia Co. was entitled to an evidentiary hearing since the action of the Commission particularly and immediately affected its interests. In response to the Commission's contention that none of the relevant factual issues was in dispute, the court observed that "[w]hether or not material issues of fact exist we can determine only after an appropriate hearing and a proper record." *Id.* at 819.

The principle of procedural due process applied in *Philadelphia Co.* and accepted in other cases, *e.g.*, *Appalachian Power Co. v. Environmental Protection Agency*, 477 *F.*2d 495, 501 (4th Cir. 1973); *American Airlines, Inc. v. Civil Aeronautics Board*, 359 *F.*2d 624, 631 (D.C. Cir.) (*en banc*), *cert.* denied, 385 *U.S.* 843 (1966), is also recognized in the statutory and case law of this State. The definition of "contested case" in the Administrative Procedure Act, *N.J.S.A.* 52:14B-2(b), quoted by the majority, *ante* at ___ (slip op. at 10), emphasizes the need to provide an evidentiary hearing to "specific parties" whose interests are affected by agency action. The definition includes those cases where a hearing is "required by constitutional right." This is such a case.

On previous occasions, this Court has emphasized the need for an evidentiary hearing where administrative action is directed at a specific party or situation, even if the action is rule making. In *Boller Beverages, Inc. v. Davis*, 38 *N.J.* 138 (1962), the Court noted that "special rulings," in which an administrator interprets a statute or regulation for the future guidance of all persons who may be affected, "may partake of both rule-making and adjudication." *Id* at 154. Addressing the proper procedure to be followed in making these rulings, the Court stated that "if the ruling is directed at a specific situation involving a single interest, the dissatisfied party should also be first entitled to a trial type hearing in the agency." *Id.* at 155. More recently, in *Cunningham v. Department of Civil Service, supra*, we held that the "crucial questions" determining the right to an evidentiary hearing are "whether the fact finding involves a certain person or persons whose rights will be directly affected, and whether the subject matter at issue is susceptible to the receipt of evidence." 69 *N.J.* at 22

The majority would have the right to an evidentiary hearing depend on the existence of disputed facts. *Ante* at .... (slip op. at 12-13). I have no quarrel with the general proposition that an evidentiary hearing is "not required on issues of law, policy or discretion." 2 K. Davis, *Administrative Law Treatise* § 12.2 at 410 (2d ed. 1979). But it is inappropriate to decide whether a party has a right to a hearing solely on the basis of a label attached to the matter at issue – a label which is often conclusory. An inquiry into the particularized effect of the proceeding is more consistent with fundamental fairness because it protects against administrative actions that substantially affect the interests of particular persons in the guise of a rule of general applicabiliy. When a rule exerts such a particularized effect, I would be less inclined than the majority to find that there are no disputed facts underlying the agency's decision.

Applying these principles to the present case, I would find that the Casino Control Commission's rule is invalid. Although the "fifty percent" rule is phrased in general terms, there is no doubt that at the present it affects only Bally. Only Bally will lose business. The Commission itself acknowledged in a prepublication version of its statement of policy that the rule was directed at Bally's domination of the market. The transcript of the public hearings held before the rule was promulgated furnishes further evidence that this rule has an individualized impact on Bally and was drafted in response to Bally's market leadership.

The record in this case also indicates that the rule has already affected Bally's sales. When Desert Palace of New Jersey requested permission to purchase 1,500 slot machines from Bally, the Commission limited the purchase to no more than 843 machines, half the number that Desert Palace would be allowed to have in operation in its casino.

Furthermore, the subject matter of the proceeding — whether Bally's present market dominance will adversely affect the economic stability of casino operations in New Jersey — is susceptible to development in an evidentiary hearing. It may be true, as the majority asserts, *ante* at ___ (slip op. at 11), that some of the facts on which the Commission's decision was based are undisputed. But conclusions to be drawn from these facts concerning the potential harm to the New Jeresy casino industry are very much in dispute. Nor is this dispute an abstract question of policy; the Commission was obviously reacting to the particular threat it perceived in Bally's current market leadership. Whether such a threat exists presents a factual question that Bally should have a chance to develop in an evidentiary hearing. Unlike the majority and concurring opinions, I would not allow the Commission, by characterizing the facts as undisputed, to deprive a party whose interests are exceptionally affected of the right to demonstrate that there are disputed facts and to present relevant

evidence. Of course, Bally should not be permitted to introduce evidence irrelevant to the issues before the Commission, such as the legality of Bally's market dominance under antitrust laws. That question is immaterial in light of our construction of the phrase "economic concentration" in the Casino Control Act. In short, under principles of due process, since the Commission's action had a particular and immediate impact on Bally alone and depended on facts on which evidence would be pertinent, Bally should have been afforded the evidentiary hearing it requested.

It is perhaps rare that administrative action that is framed in general terms will exert an immediate effect on a particular person and no one else. Nevertheless, where, as here, individualized action is taken under the guise of a general rule, the ordinary principal of representative government, that no individual has a right to an evidentiary hearing before legislative action is taken, must yield to an equally fundamental principle – that an individual has a right to participate in government action that exceptionally affects him.

For these reasons, I dissent from the judgment of the majority and would remand to the Commission for an evidentiary hearing.

IN THE SUPREME COURT OF THE STATE OF NEW JERSEY

BALLY MANUFACTURING CORPORATION, a Delaware Corporation, *Appellant* vs. NEW JERSEY CASINO CONTROL COMMISSION, *Respondent*	DOCKET NO. A-4507-78 **NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that Bally Manufacturing Corporation, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Jersey, affirming the validity of the New Jersey Casino Control Commission's Rule 19:46-1.32, entered in this action on March 17, 1981.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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FILED JUNE 4, 1981

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Notice of Appeal to the Supreme Court of the United States was mailed by regular U.S. Mail to R. Benjamin Cohen, General Counsel for the Respondent, New Jersey Casino Control Commission, 379 West State Street, Trenton, New Jersey 08625, this 3rd day of June, 1981.

/s/ ALICIA QUINONEZ

ALICIA QUINONEZ

STATE OF NEW JERSEY
CASINO CONTROL
COMMISSION

MEETING OF THE
NEW JERSEY CASINO
CONTROL COMMISSION

Arcade Building
Atlantic City, New Jersey
December 20, 1978
10:00 A.M.

COMMISSION MEMBERS PRESENT:
JOSEPH P. LORDI, CHAIRMAN
KENNETH N. MacDONALD, VICE-CHAIRMAN
ALBERT W. MERCK
ALICE D. CORSEY
PROSPERO DeBONA

APPEARANCES:
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PRESENT:
WILLIAM F. X. BAND, Executive Secretary,
BENJAMIN A. BOROWSKY, Public Information Officer,
DIANE NOTTA, Secretarial Assistant,
Casino Control Commission.

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COMMISSIONER DeBONA: Yes.

MR. BAND: Commissioner Merck?

COMMISSIONER MERCK: Yes.

MR. BAND: Commissioner Corsey?

COMMISSIONER CORSEY: Yes.

MR. BAND: Commissioner MacDonald?

COMMISSIONER MacDONALD: Yes.

MR. BAND: Chairman Lordi:

CHAIRMAN LORDI: Yes.

Is there an attorney from Mr. Wilentz' office present?

MR. HAGUE: Yes.

CHAIRMAN LORDI: I just want to make sure you are here. I will call you in a few minutes.

Mr. Santaniello, item number eleven, discussion of proposed Commission regulation concerning competition within slot machine manufacturing industries, can you address us on that, please?

MR. SANTANIELLO: Yes, Mr. Chairman.

Mr. Chairman, I believe the Commission members have the materials regarding this subject before them, so I will just outline the proposal. Under the Casino Control Act the Commission has the responsibility and the duty to encourage and preserve

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competition and to control and prevent economic concentrations in the casino operations in Atlantic City and the ancillary industries related thereto.

The proposal before the Commission right now seeks to implement this responsibility with respect to the slot machine industry. The slot machine industry, of course, is of primary concern to casinos since slot machines account for a significant portion of the gaming revenue derived by the casinos and approximately counts right now for approximately 40 to 50 percent of that revenue. It also is of particular concern because there appears to be an economic concentration in this industry in the domestic market at this point in time and the potential appears to exist for this economic concentration to be extended to the Atlantic City market.

Because of these reasons and the other reasons presented in the materials before the Commission, there is a proposed modification, or proposed amendment to the slot machine regulations that would address the concept of competition in this industry and also address the subject of economic concentration in this industry.

Since we have made some language changes

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recently in the proposed amendment, I would like to read it for the record. I enphasize that these are language changes from the version that you have and are not substantive changes. The proposed amendment reads, "Limitation on utilization of slot machines of any one manufacturer.

Paragraph A. Unless otherwise approved by the Commission, no more than 50 percent of the slot machines used in any casino in this State to conduct gaming shall have been manufactured by any one manufacturer or by any enterprise under the direct or indirect control of said manufacturer.

"Paragraph B. The Commission may modify the said limitation of Subsection A upon a finding that the casino licensee, or applicant for a casino license, has made a good-faith effort to seek out and obtain slot machines from more than a single manufacturer and that a number of adequate slot machines sufficient to comply with the

said limitations are not reasonably available for such use in said casino.

"Paragraph C. A casino licensee, or an applicant for a casino license, may seek modification of the limitation of Subsection A by filing a verified petition with the Commission alleging sufficient

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facts to satisfy the standards set forth in Subsection B.

"Paragraph D. In response to such a verified petition, the Commission may decide to summarily elicit further information from the public or other interested persons, set the matter down for a hearing, or adopt such other procedures as may be appropriate under the circumstances."

In essence, what this regulation would do would place a 50-percent limitation on the machines that could be on the casino floor from any one manufacturer and it would require a casino licensee to justify to the Commission a reason why this limitation should be modified or increased.

Mr. Chairman, I believe the proposal presently before the Commission for consideration is as to whether it should be published in the New Jersey Register to elicit public comment and I would recommend its publication for this purpose.

CHAIRMAN LORDI: Mr. Santaniello, just let me ask you this question: Do you know whether or not any other jurisdiction in which they have casino gambling has a similar regulation?

MR. SANTANIELLO: Mr. Chairman, to the best of my knowledge, no other jurisdiction that

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I know of has a regulation similar to this.

CHAIRMAN LORDI: So we are breaking new ground in this area?

MR. SANTANIELLO: Very definitely.

CHAIRMAN LORDI: And I gather then you and Mr. Fusco recommend that this proposed regulation be approved for publication?

MR. SANTANIELLO: Yes, Mr. Chairman. Mr. Fusco and I have discussed this and we both recommend that it would be approved for publication.

CHAIRMAN LORDI: For the record, my understanding is that there is an agreement between Resorts International Hotel, Incorporated, presently holding a temporary permit, that they will not purchase more than 50 percent of the authorized slot machines on the casino floor from any one manufacturer, is that correct?

MR. SANTANIELLO: Yes, Mr. Chairman. As a condition for approval of purchasing of slot machines back in May, I believe, a resolution was adopted by the Commission codifying that agreement which basically states that no more than 50 percent of the machines on the Resorts' floor could be from any one manufacturer. Of course, that 50 percent was later relaxed to some extent because of the

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justification presented by Resorts that they could not obtain that number of machines within sufficient time.

CHAIRMAN LORDI: But that was based on a representation made by the permittee to the Commission which was incorporated into a resolution, not on the basis of any policy decision or regulation that we had adopted.

MR. SANTANIELLO: Yes. That's my understanding, Mr. Chairman.

CHAIRMAN LORDI: Are there any questions of Mr. Santaniello concerning this proposed regulation?

COMMISSIONER MERCK: Mr. Chairman, what does this give us that we now don't have? I thought we had a 50 percent restriction already.

CHAIRMAN LORDI: I just made that clear, Commissioner Merck. The 50 percent restriction was basically a representation made to us by the temporary permittee which was incorporated in a resolution. It was not adopted as a policy of the Commission. I don't think we could have without the promulgation of the rule and regulation and I think what we are, in effect, attempting to do is to incorporate in a regulation the authority to,

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in effect, require this except under certain circumstances.

MR. SANTANIELLO: Mr. Chairman, just for the record, the resolution we are referring to is Resolution 78-27, which was adopted by the Commission on March 21, 1978.

COMMISSIONER MERCK: Am I correct, is there nothing in the statute that bears on the 50 percent?

MR. SANTANIELLO: There is nothing in the statute that specificially says "50 percent." There is a provision in the statute that does talk about encouraging competition and preventing economic concentration.

COMMISSIONER MERCK: Mr. Chairman, I think we are on the right track. I think here we really not only want to answer some of the objectives of the staff paper of the statement of policy, but we ought to maybe add to that that we want to provide insensitives for other manufacturers to encourage them to get into the business. As long as they know that there is just not going to be a market for their finished product, they don't have an insensitive to innovate and we really are working with antiquated technology, so anything we can do to bring that to bear in this I think is

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worthwhile. I certainly would support this thing provided it just doesn't become a situation where every appeal is

based on the fact that there are no other machines and it's reduced to meaningless. I think that might be a problem.

CHAIRMAN LORDI: Well, quite obviously I don't think we ought to address ourselves to the indications that may appear before us in the future. I don't know what the situation is. I think that what the publication of this rule and regulation will do is it will enable us, among other things, to ascertain just how many, for example, slot machine manufacturers there are, where they are located, what the market demand is, and what effect, if any, this will have on the applications of future casino licenses to purchase slot machines. I think we have to leave the merits of each case for the future, but I would think, as you pointed out, this is a step in the right direction.

I might point out as far as the statement of policy is concerned, we do want to make some revisions or changes to it and we certainly will take into consideration what you have just recommended on the record.

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Any other comments?

(No response.)

CHAIRMAN LORDI: There being no other comments, I will entertain a motion that we approve for publication the proposed regulations concerning slot machines of any one manufacturer.

COMMISSIONER MERCK: I will move it, Mr. Chairman.

CHAIRMAN LORDI: It's been moved by Commissioner Merck. Is there a second?

COMMISSIONER CORSEY: I second the motion.

CHAIRMAN LORDI: Seconded by Commissioner Corsey. Any comment on the motion?

If not, Mr. Band.

MR. BAND: Commissioner DeBona?

COMMISSIONER DeBONA: Yes.

MR. BAND: Commissioner Merck?

COMMISSIONER MERCK: Yes.

MR. BAND: Commissioner Corsey?

COMMISSIONER CORSEY: Yes.

MR. BAND: Commissioner MacDonald?

COMMISSIONER MacDONALD: Yes.

MR. BAND: Chairman Lordi?

CHAIRMAN LORDI: Yes.

The next item on the agenda is an

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application by Desert Palace of New Jersey for permission to purchase one hundred percent of its proposed slot machines from Bally Manufacturing Corporation, and quite obviously we watch very closely the order of the agenda. I understand there is an attorney to represent Desert Palace.

Would you step forward.

MR. HAGUE: Douglas Hague, from the law firm of Wilentz, Goldman & Spitzer in Woodbridge.

I think my timing, coming on this agenda, is pretty poor.

At any rate, our application is based upon the fact that we have hopes of tentatively obtaining approval from the Commission to operate in May. There is considerable drag time and lag time in ordering machines and having them delivered. I believe the manufacturing lag time is some three months and thereafter there has to be an installation situation. We have hopes of some 1500 slot machines to install. My feeling on the subject is that

obviously with the Commission's program today, there is absolutely no chance of my doing anything other than asking for a type of plenary hearing in which to enable Desert Palace to produce proof before this Commission why we feel that the

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Bally Slot Machine is the one that we would like to install at some figure close to 100 percent and obviously greater than 50 percent. To go into the merits of that would deal with the proposed new regulation. Our feeling that the term of adequacy insofar as performance really has a lot to do with the fact that we feel that the superior product that we would like to have on the premises is the one that justifies our application, so we do seek to prove before the Commission at some future date as soon as possible the fact that we would like either an increase in the permission to install these machines at a figure much greater than 50 percent, and preferably closer to 100 percent.

CHAIRMAN LORDI: I think in your application you asked for permission to purchase 100 percent of your proposed Atlantic City slot machines. How many machines are we talking about?

MR HAGUE: We would like 1500 machines.

CHAIRMAN LORDI: Mr. Fusco, perhaps you can enlighten the Commission on the proposal as submitted by the applicant for a casino license, Desert Palace of New Jersey, and what that proposal shows with respect to the number of slot machines that they would be authorized?

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MR. FUSCO: Mr. Chairman, the current discussion, of course, the Commission hasn't given any facilities approval to the Caesars' Building, but the current discussions show a proposed casino and, Mr. Hague, correct me if I'm wrong, of 57,400 square feet. That's the last number that we have.

MR, HAGUE: That's correct.

MR. FUSCO: If that be the number, applying the formula contained in the statute no greater than 30 percent of the first 50,000 square feet of casino floor space may be occupied by slot machines, and so 30 percent of the first 50,000 is 15,000 square feet for slot machines and then no greater than 25 percent of any thing over 50,000 square feet can be applied to slot machines and can be used for slot machines, and so that would be 25 percent of 7,400, or, to my calculation, 1,850, so that it would total 16,850 square feet of the casino floor could conceivably on a maximum basis be dedicated to slot machines.

Now, the Commission regulation is pending and the formula that has been used or is presently being used in discussion with casino developers is the slot machines may not have a density of greater than one slot machine for each square foot of floor

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space, so to my calculation, that would entitle Caesar's to a possible maximum, without any other considerations going into it, of 1,685 machines. I'm sorry, one machine per ten square feet of casino space, so that would entitle them to a maximum of 1685 machines. Now, 50 percent of that obviously is 842½ or 843, so if the request is to purchase 1,500 machines from Bally, applying our formula, 50 percent of what their maximum entitlement would be, would be 843 machines.

CHAIRMAN LORDI: Let me ask you this: They're asking for obviously an exception from a specific regulation of the Casino Control Commission. For the record, and to refresh in our recollections, will you identify that regulation and discuss it with me?

MR. FUSCO: The regulation is New Jersey Administrative Code 19:41-1.2B(4). That's the regulation citing. The regulation indicates that no slot machine may be

used in a New Jersey casino unless the manufacturer of that slot machine has been licensed as a casino service industry by the Commission. That's what that regulation provides.

That regulation reaches transactions which are only completed prior to the time that,

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for example, Caesars' would obtain a casino license, so even if business is not done with, for example, Bally, after Caesars' would get a casino license, this regulation would still reach that type of transaction because Caesars' would have to have permission to use that machine and, if it used the machine, the manufacturer would have to be licensed.

Now, that regulation, that 1.2B(4) goes on to say that the Commission can entertain and consider requests for relief from its provisions and it is precisely that regulation which is what the Commission dealt with in March of this year on the application of Resorts. It's the same regulation, I think, that the Commission gives consideration to here when it entertains Mr. Hague's application on behalf of Caesars'.

CHAIRMAN LORDI: This regulation is based on the authority given to us by statute, but is not specifically provided for under the statute, is that correct, so we have a right to grant exceptions to this regulation?

MR. FUSCO: Yes, sir. The limits of the statutory requirement are that if Caesars' were to engage in business once it receives its license, or temporary permit, anything occurring chronologically

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after that date the slot machine company would have to be a licensee, but the regulation attempts to give more meaning to that statutory provision, but transactions occurring at this point in time are not strictly speaking within

the literal terms of the statute and they come only within the regulation.

CHAIRMAN LORDI: Okay, fine.

I understand also that before these machines can be installed, they must be inspected by both the Division and the Commission and approved by the Commission, is that correct?

MR. FUSCO: Absolutely. In addition to licensing the company that manufactures it, each machine itself has to be individually licensed. That is individually licensed and the tax paid, but individually licensed and measured against a prototype that has been approved by the Commission.

CHAIRMAN LORDI: Are there any manufacturers of slot machines that have been licensed by the Commission?

MR. FUSCO: No, there are not. There are at least four manufacturing companies, manufacturers of slot machine companies, with casino service industry license applications pending. None have to date been presented to the Commission.

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CHAIRMAN LORDI: Perhaps I should address this question to Mr. Santaniello.

Mr. Santaniello, is it necessary, based on your experience and the information that you developed now that you have been with the Commission and prior thereto, is it necessary that an applicant for a casino license have a certain lead time in which he must order the slot machines in order to have them manufactured, delivered and installed within that time?

MR. SANTANIELLO: Mr. Chairman, that is very definitely the case, especially in terms of the quantity of

machines we are talking about with respect to the Atlantic City casinos. There is a need for a significant degree of lead time to not only get the machines manufactured, but also to get a prototype model into the Division of Gaming Enforcement for review and analysis and potential approval by the Commission.

CHAIRMAN LORDI: Thank you.

Any questions from the Commission members?

If there are no questions, I will entertain a motion that we authorize Desert Palace of New Jersey, or we give permission to Desert Palace of New Jersey, to purchase 843 slot machines

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to be installed after they receive a casino license, of course, and after they have been appropriately inspected by both the Division and Commission staff and approved by the Commission.

COMMISSIONER MERCK: I will move it.

CHAIRMAN LORDI: There has been a motion made. Is there a second?

COMMISSIONER DeBONA: I will second it.

CHAIRMAN LORDI: It's been seconded by Commissioner DeBona.

Any comment on the motion?

COMMISSIONER DeBONA: Yes. Mr. Hague, is it Hague?

MR. HAGUE: Yes.

COMMISSIONER DeBONA: Did I hear you correctly, did you say you hope to be in operation in May?

MR. HAGUE: With your permission, we hope to be in operation in May.

COMMISSIONER DeBONA: Of 1979?

MR. HAGUE: Yes.

CHAIRMAN LORDI: Any other comment? If not, Mr. Band will you take the vote?

MR. BAND: Commissioner DeBona?

COMMISSIONER DeBONA: Yes.

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MR. BAND: Commissioner Merck?

COMMISSIONER MERCK: Yes.

MR. BAND: Commissioner Corsey?

COMMISSIONER CORSEY: Yes.

MR. BAND: Commissioner MacDonald?

COMMISSIONER MacDONALD: Yes.

MR. BAND: Chairman Lordi?

CHAIRMAN LORDI: Yes.

With respect to any applications you may have over and beyond that, you will have an opportunity, of course, to address yourself to the proposed regulation and, of course, can make any application you want.

MR. HAGUE: I expect we would do that under the regulation that's going to be coming.

COMMISSIONER DeBONA: It hasn't been adopted yet, you know.

CHAIRMAN LORDI: That's true.

COMMISSIONER MacDONALD: Mr. Chairman, I have a question.

CHAIRMAN LORDI: Yes.

COMMISSIONER MacDONALD: Since our experience from the beginning with machines, Bally has been the

principal one for whatever reason. Have there been major other machines that seem to

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have passed the test? I only heard of one. What happened to the other ones?

MR. SANTANIELLO: There are several companies that do manufacture slot machines in this country besides Bally. I can name a few offhand. One is T.J.M. Another one is Williams Electronics which manufactures the Seeburg machine and the third which I recall offhand is Gamex. Since we adopted the resolution regarding Resorts, there has been increased interest in this industry and there are other manufacturers that are in the process of attempting to enter in and compete with these other manufacturers with respect to the Atlantic City market and these include not only other established foreign firms, but also domestic firms that are beginning to look at the market and seek to enter it.

In terms of applications, we do have applications from T.J.M. right now and Williams Electronics.

CHAIRMAN LORDI: Perhaps I can follow up on the question as posed by Commissioner MacDonald.

Can you tell us how many manufacturers have provided slot machines to Resorts International?

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MR. SANTANIELLO: Right now Resorts has machines from three different manufacturers on its floor. Most of the machines are Bally machines right now. They also have approximately, if my recollection serves me correctly, approximately 150 machines from Williams Electronics and 50 machines from T.J.M.

CHAIRMAN LORDI: What are their total number of authorized machines? If you don't know, that's all right. I am not going to test your memory.

MR. SANTANIELLO: Mr. Chairman, approximately 1351 machines.

CHAIRMAN LORDI: Thank you very much, Mr. Santaniello.

Any other questions?

MR.FUSCO: Mr. Chairman, could I just ask the Commission one thing so it's clear? The permission to purchase in no way indicates the Commission's final determination on how many machines could be used, or in no way determines how many of one manufacturer's machine could be used on the floor. That awaits the reaching of that question.

CHAIRMAN LORDI: I think we conditioned our resolution on that.

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COMMISSIONER MERCK: What about the Continental Machine? Did I hear you mention that, Mike?

MR. SANTANIELLO: Commissioner, the Continental Machine, to the best of my recollection, is manufactured by Bally right now.

COMMISSIONER MERCK: Well, I am aware, Mr. Chairman, of two interested potential manufacturers, one of whom has advanced his prototype to the point where he has taken it to Nevada, but did not receive a very hospitable reception, not because of the machine.

There is another potential manufacturer. Both of these people are interested in simplifying the mechanisms, in bringing in printed circuitry and that type of thing, and also reducing maintenance cost, breaking down, and so forth, so I think here we may be surprised at the number of potential things that could happen if we stick with this rule.

CHAIRMAN LORDI: May I suggest this, Mr. Santaniello, now that we have approved for publication this

proposed regulation, that perhaps you can try to identify the other manufacturers in this country that manufacture slot machines, or contemplate the manufacture of slot machines and

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send them a copy of our proposed regulation.

MR. SANTANIELLO: Mr. Chairman, I will do that.

CHAIRMAN LORDI: All right, thank you.

I believe, Mr. Weinroth, I believe that you have an application that doesn't appear on our agenda, but we do have a letter.

MR. WEINROTH: Pardon the quality of these copies.

Mr. Chairman, I have a letter from myself directed to yourself dated December 18, 1978, which is relatively brief and I will read it into the record.

"Re: 19:46-1.1D.

Dear Mr. Lordi: As you are aware the above-referenced regulation requires that by January 1, 1979, a metal insert chip be utilized in the casino. While Resorts International Hotel, Incorporated, believes that the chips presently in use in the casino are superior to the metal insert chip from the perspective of security, we will, of course, comply with the regulation. However, it should be noted that the one chip manufacturer presently licensed as a casino service industry has indicated an unwillingness to manufacture the metal insert

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CERTIFICATION

I, MYRON GEIST, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, do hereby certify the foregoing to be a true and accurate transcript of my stenographic notes taken at the time and place hereinbefore set forth.

/s/ MYRON GEIST

Myron Geist, C.S.R.

DATED: 12/26/78

STATE OF NEW JERSEY
CASINO CONTROL COMMISSION
379 WEST STATE STREET
TRENTON, N. J. 08625
PHONE NUMBER: 609-292-7730, 7731

JOSEPH P. LORDI
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COMMISSIONERS
WILLIAM F. X. BAND
EXECUTIVE SECRETARY

ATLANTIC CITY OFFICE
TENNESSEE AND BOARDWALK
PHONE NUMBER: 609-348-3700

June 15, 1979

Mr. Clive S. Cummis, Esq.
Sills, Beck, Cummis, Radin & Tischman
33 Washington Street
Newark, N. J. 07102

RE: PROPOSED AMENDMENT TO
REGULATIONS REGARDING
USE OF SLOT MACHINES

Dear Mr. Cummis:

As you know, the Commission previously caused to be published a proposed amendment which would limit to 50% the number of slot machines which a casino licensee may acquire from a single manufacturer. The text of the proposed amendment appeared in the New Jersey Register, 11 *N.J.R.* 108, on February 8, 1979. Since that time, the Commission has received data, information and comment from many interested persons.

The Commission will consider adoption of the proposed amendment at its public meeting on June 20, 1979, which will be held at the Commission Offices, Tennessee and Boardwalk, Atlantic City. Since you have previously expressed an interest in this proposal, you may wish to know how the Commission will conduct the proceedings.

In considering the adoption of the proposed amendment, the Commission will be exercising its rule-making authority and acting in its quasi-legislative capacity. Thus, the Commission will consider arguments of counsel directed to the authority of the Commission and to such general facts or information as will assist the Commission in determining questions of law, policy and discretion. Presentation of factual testimony through witnesses under oath and subject to cross-examination would not be appropriate. Therefore, any presentation will be restricted to relevant arguments of counsel.

As to time limitations, the Commission has not set a rigid schedule. However, the volume of business confronting the Commission dicates that each presentation be kept as brief as possible. In this regard, you may be assured that the Commission and its staff have read and considered all written comments or memoranda which have been submitted.

If you have any further questions on this matter, please do not hesitate to contact this office.

Very truly yours,

/s/ ROBERT J. GENATT

Robert J. Genatt
Senior Assistant Counsel

ceh
cc: R. Benjamin Cohen
Michael A. Santaniello

STATE OF NEW JERSEY

CASINO CONTROL COMMISSION

MEETING OF THE)
NEW JERSEY CASINO)
CONTROL COMMISSION)

Arcade Building
Atlantic City, New Jersey
June 20, 1979
10:25 a.m.

BOARD MEMBERS PRESENT:

JOSEPH P. LORDI, CHAIRMAN
KENNETH N. MacDONALD, VICE-CHAIRMAN
ALBERT W. MERCK
ALICE D. CORSEY
PROSPERO DeBONA

APPEARANCES:

MICHAEL A. SANTANIELLO, SENIOR COUNSEL,
R. BENJAMIN COHEN, GENERAL COUNSEL,
JOSEPH A. FUSCO, SPECIAL COUNSEL FOR LICENSING, AND
WALTER KOPROWSKI, JR., ASSISTANT COUNSEL,
For the Casino Control Commission.

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STEPHEN C. BECKER, DEPUTY ATTORNEY GENERAL, and
GUY S. MICHAEL, DEPUTY ATTORNEY GENERAL,
For the Division of Gaming Enforcement.

DONALD G. TARGAN, ESQ.,
For Joseph Carlacci and Albert Washington.

STERNS, HERBERT & WEINROTH, ESQS.,
BY: RICHARD K. WEINROTH, ESQ.,
For Resorts International.

[2]

SILLS, BECK, CUMMIS, RADIN & TISCHMAN, ESQS.,
BY: CLIVE S. CUMMIS, ESQ. and
LOUIS B. SCHWARTZ, ESQ. (Pa. Bar),
For Bally of New Jersey.

WILENTZ, GOLDMAN & SPITZER, ESQS.,
BY: MORRIS BROWN, ESQ.,
MATTHIAS D. DILEO, ESQ.,
BRIAN J. MOLLOY, ESQ., and
RICHARD H. SHEEHAN, JR., ESQ. (Calif. Bar),
For Boardwalk Regency Corp. (Caesars).

CONNELL, FOLEY & GEISER, ESQS.,
BY: ADRIAN M. FOLEY, JR., ESQ.,
ROSS D. LONDON, ESQ., and

GOLENBOCK & BARELL, ESQS., (N.Y. Bar),
BY: JUDSON GOLENBOCK, ESQ., and
ARTHUR HANDLER, ESQ.,
For Williams Electronics, Inc.

RIBIS, LOCASCIO & McCLUSKEY, ESQS.,
BY: NICHOLAS L. RIBIS, ESQ.,
For OTX.

GOLDENBERG, MACKLER & FEINBERG., ESQS.,
BY: HARRY A. GOLDENBERG, ESQ.,
For Melvin W. Buel.

GOLDENBERG, MACKLER & FEINBERG, ESQS.,
BY: KENNETH MACKLER, ESQ.,
For A.C. Coin & Slot Co.

JACK E. GRANZOW, ESQ.,
For Herbert L. Fisher.

R. JOEL SLOMOFF, ESQ.,
For A.E.S. Technology Systems.

ALTEN, VALENTINE & SELTZER, ESQS.,
BY: RICHARD D. ALTEN, ESQ.,
For Ainsworth Consolidated Industries, Ltd.

MORGAN, MELHUISH, MONAGHAN & SPIELVOGEL, ESQS.,
BY: HENRY G. MORGAN, ESQ.,
For Amusement Technology of Asbury Park.

[3]

COOPER, PERSKIE, KATZMAN, APRIL, NIEDELMAN & WAGENHEIM, ESQS.,
BY: PHILIP J. PERSKIE, ESQ.,
For A-1 Supply, Inc.

PRESENT:

WILLIAM F. X. BAND, Executive Secretary,
DIANE NOTTA, Secretarial Assistant,
CHRISTOPHER D. STORCELIA, Chief, Employee Licensing Section, and
WILLIAM J. HOFFMAN, Chief, Casino Service Industries,
Casino Control Commission.

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CHAIRMAN LORDI: Yes, we better vote.

MR. BAND: Commissioner DeBona.

COMMISSIONER DeBona: Yes.

MR. BAND: Commissioner Merck.

COMMISSIONER MERCK: Yes.

MR. BAND: Commissioner Corsey.

COMMISSIONER CORSEY: Yes.

MR. BAND: Commissioner MacDonald.

COMMISSIONER MacDONALD: Abstain.

MR. BAND: Chairman Lordi.

CHAIRMAN LORDI: Yes.

The last item on the agenda is "Consideration for adoption of proposed amendment to *N.J.A.C. 19:46-1.32* regarding the use of slot machines," that is the 50 per cent limitation rule.

I would like to ask Mr. Cohen if he has any comment with respect to it before I ask any of the parties that are here with their attorneys to address this matter.

MR. COHEN: Mr. Chairman, the only comment I would have is this: in consultation with Mr. Santaniello, of our staff, we have prepared a Statement of Policy to accompany the proposed regulation. The Statement of Policy is just that, it merely is an attempt to set forth and clarify some of the reasons

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for and the purposes of the regulation. It really does not in any way add anything substantive or make any changes.

CHAIRMAN LORDI: Wherein does it differ, very briefly, from the Statement of Policy that was attached to

the proposed regulation when it was approved for publication?

MR. COHEN: Mr. Chairman, I do not believe we ever attached any Statement of Policy to the regulation that was published.

MR. SANTANIELLO: Mr. Chairman, prior to this time there was a Statement of Policy, but it remained in the draft stages and has had several revisions and was never published with the regulation.

We would propose at this point in time a final draft of that Statement of Policy, which is before the members of the Commission. And, as Mr. Cohen says, it does not change anything substantive in the regulation. It just espouses the authority behind the promulgation of the proposed regulation and also the policy as to which the regulation seeks to achieve.

I would like to read that Statement of Policy quickly. It reads as follows:

"The Casino Control Act places on the

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Commission the responsibility to encourage and preserve competition and to control and prevent economic concentration in the casino operations in Atlantic City and the ancillary industries related thereto. This duty is specifically set forth in section 5:12-1 (b) (12) of the Act which states:

" 'Since the economic stability of casino operations is in the public interest and competion in the casino operations in Atlantic City is desirable and necessary to assure the residents of Atlantic City and of this State and other visitors to Atlantic City varied attractions and exceptional facilities, the regulatory and investigatory powers and duties conferred by this act shall include the power and duty to regulate, control and prevent economic concentration in the casino operations and the ancillary industries regulated by this act, and to encourage and preserve competition.'

"In setting forth this and other obligations of the Commission, the Legislature also provided the Commission with powers consonant with its broad range of duties. Illustrative of this is the authority of the Commission 'to adopt, amend, or repeal such regulations, consistent with the policy and objectives of this Act, as it may deem necessary

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or desirable for the public interest in carrying out the provisions of this Act.' *N.J.S.A.* 5:12-69 (a). Similarly, the Act permits the Commission to 'exercise any proper power or authority necessary to perform the duties assigned to it by law' and further provides that 'no specific enumeration of powers in (the) act shall be read to limit the authority of the Commission to administer (the) act.' *N.J.S.A.* 5:12-75.

"Seeking to effectuate the policies of the Act and to fulfill its statutory mandate, the Commission finds a present need to impose specific regulatory controls to prevent economic concentration and to further competition in the slot machine industry. This need is compelling since slot machines directly account for a substantial portion of the gaming revenue derived by a casino.

"The interest of the State in adopting this regulation is grounded in several considerations. First, the regulation would stimulate and insure a degree of competition in the slot machine industry within the New Jersey market. The regulation would serve as a continuing incentive for new companies to enter the market and for existing companies to enhance the quality and customer appeal of their products in order to

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maintain or increase their respective market shares. Next, the regulation would inhibit economic concentration in the casino gaming industry in New Jersey along with the potential problems accruing from such concentration.

Finally, the regulation would prevent the very real and practical dilution of the State's regulatory power which would result if the casino gaming industry were dependent upon any single slot machine manufacturer. Slot machines are unique in that they generate between forty and fifty percent of casino revenues. It is essential, therefore, that excessive concentration of economic power in any one enterprise over the casino gaming industry in this jurisdiction be prevented. In light of these considerations and in light of the statutory mandate to regulate, control and prevent economic concentration, the Commission finds that it would be undesirable for the Atlantic City market to be dominated or controlled by any single slot machine manufacturer.

"In addressing this subject, the regulation seeks to avoid economic concentration and to stimulate competition by compelling casino operators to seek suitable slot machines for use in the casino from more than one manufacturer. In this way, it also seeks to broaden entrepreneurial opportunities in the slot

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machine industry and to create a dispersion of economic power with respect to the casino industry in Atlantic City. Additionally, it endeavors to create a greater multiplicity of choices for purchasers of slot machines and potentially more diverse gaming opportunities to the slot machine player by providing machines manufactured by different suppliers.

"The means by which the regulation seeks to accomplish these goals is to place an initial limitation on the percentage of machines from any one manufacturer that can be placed on the casino floor at any one time. By establishing a limitation of fifty percent, no single manufacturer is permitted to achieve a majority of the market share. This percentage limitation, however, is not absolute and can be increased, conditioned or otherwise modified by the Commission if a casino operator can present valid and justifi-

able reasons that warrant a subjugation or relaxation of the purposes and policies underlying the regulation."

Mr. Chairman, that is the end of the proposed Statement of Policy. I would just note, as the Commission is very much aware, that we have received numerous comments regarding the proposed regulation. Copies of those comments have been

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submitted to each member of the Commission, and most of the comments that were received were distributed to other private parties that submitted comments, with the exception of one or two comments that we just received in the last couple of days.

CHAIRMAN LORDI: Is there anything else that you would like to say, Mike?

MR. SANTANIELLO: No, Mr. Chairman.

CHAIRMAN LORDI: I would ask at this time — Yes, Mr. Merck.

COMMISSIONER MERCK: Mr. Santaniello, I think the only question I would have here as to your thrust of this policy was whether the determination of market share in respect to 50 per cent was a priority rather than the 50 per cent of an individual casino.

Do you understand my question? That is to say, assume, as we have had to for various reasons in the past, that we allow the first two casinos to have more of one manufacturer than 50 per cent. This is within your policy statement of not having it inflexible, I understand that.

However, let us assume that ten casinos ultimately open. The remaining eight may have 50 per cent, we will say, no more than 50 per cent of

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any single manufacturer on the floor. But the two preceding and first opening casinos having a higher per cent, we

would have a market share for one manufacturer that would be higher than 50 per cent overall. I'm just wondering whether your intention here is to assign a priority to market share as to the eventual population of casinos.

MR. SANTANIELLO: Commissioner Merck, my intention, or at least as I interpret the regulation, is not to simply accomplish the result of having one manufacturer being limited to 50 per cent of the market share in the Atlantic City market. The purpose of the 50 per cent is not to meet the 50 per cent. The purpose of the 50 per cent is that this percentage is a vehicle for giving incentive to competition in this industry. The 50 per cent is a means for impeding or preventing economic concentration. It is a means for granting, as I mentioned in the policy statement, the real and practical dilution of the state's regulatory power which would result if the casino gaming industry were to depend on any single manufacturer.

So the end result or the end goal is not that the 50 per cent market share is achieved; the 50 per cent is only a means for attaining these other

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goals, and it's going to be dependent upon the factors that exist down the road whether the 50 per cent will attain these goals.

CHAIRMAN LORDI: I understand that there are attorneys representing various parties that would like to be heard concerning the regulation.

I notice you standing, Mr. Cummis, but I was hoping I could ask those attorneys whose clients support the regulation to first address the Commission and then you, Mr. Cummis, or anyone else who opposes it would then have an opportunity to respond.

I would hope, too, that each of the attorneys recognizes that there are limitations on time. We have been working all day. We don't want to in any way frustrate

you in your efforts to put across whatever points you have, but we have a regulation and we would like you to address yourself to that regulation.

Mr. Foley.

MR. FOLEY: Adrian Foley, Williams Electronics.

Might we enter the appearances on the record?

CHAIRMAN LORDI: By all means, that would be helpful.

May I just make this one observation, Mr. Foley and others, that Commissioner Merck has just

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pointed out to me that we have indeed read your written memorandums of law and that all the Commission members have copies of them. So that if you can, as I say, address not only these matters very succinctly and very carefully and any other matters that you might have, but recognizing that we do indeed know what your position is.

MR. FOLEY: We are very mindful of that, and the admonition implicit in it is well received.

To that end, I might state just briefly, we have attempted during the intermission to do two things to alleviate the time and burden.

I should like first of all to give credit to the staff for greatly narrowing the issues by the circulation of all the comments. I think it's a most intelligent procedure, it's been of great assistance to us, and I think would limit any discussion.

I should probably acknowledge that after hearing the Statement of Policy, there is little more for us to say. We endorse completely that well-conceived and I believe most cogent statement of policy, and we do endorse it in its entirety.

I will be brief, in an attempt to expedite and to work any possible economies of time. We have

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discussed the matter. The first thing that will be done is that we are going to divide the support statements into very brief statements. My own part will rely upon the brief which we have filed in this case.

I shall advert to Point 1, which consists of the market dominance of Bally. I think it's an acknowledged fact and it needs no repetition here. I will address myself briefly to the constitutional problems endorsing the proposal by this Commission and addressing the due process and equal protection clause.

Mr. Ribis, I believe, will address himself to the commerce clause.

Again, to limit ourselves, we have also present the attorneys, whose presence I have noted here on the record, who are here to help the Commission, we suggest, in explaining what the impact will be to their particular clients, especially those which are resident here in Atlantic City.

With that preamble and promising to again follow the suggestion or admonition, I would really summarize the arguments we have advanced in the brief, reiterating them in their fullest. I would suggest that the need for competition, which was your

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statutory mandate, is being properly addressed in this regulation. To suggest that this is beyond your powers, the implicit powers of the state exercising it police power, is to fly in the fact of every occasion which either our own Supreme Court or the United States Supreme Court has addressed itself to that problem.

The question of whether there is any violation of due process or equal protection is, likewise, fully addressed I think in our brief. We point out that the tests of the Nebbia case are not only clear and cogent, but your meet-

ing of the test in the Nebbia case is quite clear and certain in the manner that you have noted in your regulation.

I should simply ask only one thing, and that is to invite your attention by way of emphasis most respectfully to the cases cited on page 28 of our brief and, with your permission, read one sentence.

We say there that we think the best summary of the unquestioned power of the state to regulate gambling was determined in the case of Medina vs. Rudman, and the citation is given. That one sentence I would quote: "We think the state, under its police powers, is entitled, if it elects, to issue racetrack licenses, and to regulate participation thereunder,

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on a discretionary basis as it has chosen to do so here. Given the social evils associated with gambling and the state's revenue interests, the state's choice of means in the selections of licensees is entitled to prevail over the private interests of potential investors."

The quote I think is most apt. I don't intend to burden this body with lengthy argument. I will not address myself to the various points raised by Mr. Cummis and Mr. Schwartz in their brief. I would fairly, in arbitrary fashion, I guess, suggest that most of them are predicated upon premises which are not substantiated in their comments. Some of them I must take offense, as I think this Commission probably does. The suggestion that you or we would be in any way influenced by the threat of lengthy litigation, I'm sure that it has no effect upon the people you find here, and I'm sure that this Commission surely will not have anything other than, I trust, the same feelings that we have in that regard.

I will also suggest, as you well know, this Commission well knows, that it has the inherent power to meet any such threat.

With that, I would ask Mr. Ribis to address the commerce point. We will, of course, be available

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for questions. We just don't want to extend the hearing.

COMMISSIONER DeBONA: Mr. Foley, do we have your full name for the record?

MR. FOLEY: Adrian M. Foley, Jr., of Connell, Foley & Geiser.

With me are Mr. Ross D. London, of my office; and Judson Golenbock and Arthur Handler, of Golenbock & Barell.

MR. RIBIS: Mr. Chairman, members of the Commission, I'm Nicholas Ribis, on behalf of OTX, who just recently acquired TJM, who are the manufacturers and the distributors of the Jenning Mills slot machines.

I have recently submitted a lengthy memorandum to Mr. Santaniello outlining both the arguments relating to the power and authority of this Commission to propose and pass this regulation and also directing our attention to the constitutional issues which have been raised by Mr. Cummis on behalf of Bally in opposition to the proposed regulation.

I think it's inappropriate for me to regurgitate the lengthy arguments made both in Mr. Foley's memorandum, as a proponent of the regulation, and in my memorandum submitted to the Commission staff. However, I would like to note several things.

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As stated by Mr. Santaniello in the Statement of Policy just read into the record, I think that the statutory powers given to this Commission clearly encompass the passing of regulations relating to the slot machine industry, specifically directed to the question of concentration of power and control of the market.

I don't think there is any question that this Commission has the power and authority to consider and pass such a regulation. Furthermore, it has followed the requirements of the statute in the Administrative Code relating to the passage of this regulation.

I do want to make two points. There has been an argument presented by Mr. Cummis relating to the appropriateness of notice and the question of a hearing relating to this regulation. I will address this very quickly. It's raised under the right-to-know and notice arguments in Point 1 of Mr. Cummis' brief.

It is interesting to note that we are here today for a hearing on this proposed regulation. The requirement is that the proposed regulation be published. It has been published, it was published many months ago. Mr. Cummis and all opponents of

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the regulation have had an opportunity to submit their arguments, and they have done so.

I cannot understand and do not understand the argument made under the Administrative Code that this is not sufficient public notice and sufficient public hearing to pass this regulation. I don't think there is any authority under this statute for this Commission not to consider and pass this regulation today.

Secondly, in the area that I would like to just present is the question of whether or not this regulation is violative of the commerce clause under the Constitution. I think, simply stated, that there is no question that the commerce clause is not a barrier to the proper exercise of the police power in an agency passing a regulation effecting the safety, health, or welfare of the citizens of a state. I think that the statute under which this Commission acts allows you to do that and requires and mandates you to do that.

This proposed regulation I believe does that, and certainly in my mind and the authority cited in our memo-

randum, and I don't think there is any reason to go into this again, allows this Commission to pass this regulation.

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I think that the cases which have been cited by both sides indicate that there is this authority, including the authority cited in Mr. Cummis' brief, when read closely, indicate and state that there is this authority and the action of this Commission in passing this regulation would not be violative of the commerce clause under the Constitution.

Finally, I would like to state that my client, who probably is the second largest domestic manufacturer of slot machines, holding less than ten per cent of the market, is vitally interested in continuing to supply slot machines in New Jersey, pursuant to the regulation which is proposed here today. It has supplied slot machines under the administration of this proposed regulation to Caesars Boardwalk Regency and intends to continue to do so. We endorse this proposed regulation and request that the Commission act on the regulation today, if possible.

Thank you very much.

CHAIRMAN LORDI: Mr. Ribis, can I ask you a question?

MR. RIBIS: Yes.

CHAIRMAN LORDI: In Bally's specs on page 11 it says in part consequently, there is no factual basis before the Commission for which it may determine

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that 50 per cent or any percentage is a fair market share and, thus, the Commission's recommendation appears to be randomly selected. It does appear on its face to be arbitrary and capricious on the basis there is no factual basis upon which this determination can be made. How do you answer the question of arbitrary and capricious in that this was a random selection?

MR. RIBIS: I think any regulation this Commission may pass could be attacked as being arbitrary and capricious, because the basis of your authority to pass those regulations is within the statute. That is the complete control of this industry. The factual basis that is argued here by Bally is there has been no showing. I don't think there's a requirement of a showing that this Commission needs authority to regulate this industry and that's what it's doing. It's enhancing competition.

CHAIRMAN LORDI: I just mean the fact we selected the 50 per cent rule as opposed to 25 per cent or 75 per cent. That's what they're addressing.

MR. RIBIS: I think it's discretionary. Any percentage you may choose, whether 25 or 95 per cent, one could argue, depending on which side of the line

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you are, could argue it's arbitrary as to them. I don't think any figure could be less arbitrary than a 50 per cent rule which seems to encourage fair competition on all sides.

CHAIRMAN LORDI: Thank you.

MR. MACKLER: Commissioner Lordi, members of the Commission, my name is Ken Mackler. I'm at attorney-at-law and I represent Atlantic City Coin and Slot Company. That is a local distributor for Jenning's machines. My purpose in presenting to you some information is not to argue the law to you or to give you the theory upon which you can properly ack, but to tell you the facts as we see them and what the proposed 50 per cent rule has done for us. We're a local company. It was founded in Atlantic City. It was developed after the casino gambling referendum was passed. It employs presently six full-time people and six part-time people. Among which the part-time and full time are members of the minorities. We've taken our people from a cross section of life. We've worked

with CETA. We have taken people from the New Jersey Employment Office. We have taken people out of other areas of employment, machinists, mechanics, I think one or two people have electrical backgrounds and we have developed a delivery system for the local

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representation of a national manufacturer. We have gone ahead and purchased the building, a warehouse facility. We've refurbished it, spent a lot of money and committed a lot of money to that and all on the basis that we would be able to provide better service than any competitor in the Atlantic City market. All we're asked to do by this regulation is to be given a chance to bid and to be competitive in the Atlantic City market. Without the protection of this Commission and without the necessity of this regulation we would not be in a position to even be a competitor and to offer competitive services and competitive operations to Bally or any other manufacturer.

There is no question as to the dominance in the market and no question as to the dominance in the market on a worldwide basis, as well as in the continental United States. What you have done is permitted competition. What you have done is given jobs to local people. Between March 30 and May 15th when the machines were received from Chicago and they had to be prepared for the floor of Caesars we had full-time employment of 35 people, six days a week and that went to the local economy. The building went to the local economy. The contractors went to the local economy. The people that are from the area

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are in the local economy, and we present these facts to you as the basis for which your regulation is proposed, that is, number one, help the State of New Jersey, help the employment and the industry of the State of New Jersey, but more importantly, help foster competitive growth within the industry. Thank you.

CHAIRMAN LORDI: Thank you.

MR. ALTEN: Mr. Chairman, Commissioners, my name is Richard Alten and we represent the Ainsworth Consolidated Industries, Ltd. which is an Australian manufacturer which manufactures the Aristocrat machine. We also represent Mr. Jerry Rothbard who will be a local distributor for the Aristocrat machine. In our discussions prior to coming into the session as we sat around to line up and decide what would be spoken by each member, we didn't have the opportunity, nor the benefit of the legislative statement attached to this regulation. Quite frankly, this legislative statement sort of preempted anything I had to say with regard to our feelings about the proposal. The only instance I would like to bring to your attention is that in the order that came out of the case, the State of New Jersey vs. Resorts International and the 83 per cent rule, the statute N.J.S.A. 5:12-100(e) was discussed and the context was that the legislative concern

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in this regard is supported by the fact that the 83 per cent requirement is found in the same subsection as and immediately following the legislative statement that the rules promulgated by the Commission should seek to "assure the vitality of the casino operations and ensure maximum participation by casino patrons." I think that that concept and that approach to the opportunity of patrons to have a fair opportunity, vis-a-vis the casino should be extended and is extended by this proposal to the industry, that is, the industry of the manufacturer for slot machines. I would join in adopting the arguments of my colleagues and join with them and join with the Commission that this proposed amendment be accepted. Thank you very much.

CHAIRMAN LORDI: Thank you.

MR. MORGAN: Good afternoon. I'm Henry Morgan from West Orange. I represent Amusement Technology of Asbury Park. We have an application pending.

CHAIRMAN LORDI: I know who you are. Your Judge Morgan's husband.

MR. MORGAN: You know, if I was going to say I was grateful to somebody, it's the man who kept the air conditioning working here all day long. I represent Amusement Technology of Asbury Park.

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We hope to build a small plant to assemble and build slot machines. We feel it would be an important contribution to the economy. We feel this regulation is vital to encourage the growth of and have other slot machine companies enter the industry. I will rely upon the arguments of my colleagues. Thank you.

COMMISSIONER DeBONA: Very well done, Mr. Morgan.

MR. MORGAN: You mean I was the shortest.

MR. PERSKIE: Mr. Chairman and members of the Commission, my name is Philip Perskie and I'm an attorney. I represent A-1 Supply, Inc., the manufacturer of the Fortune slot machine. I seek your permission to speak before you today even though A-1 has not submitted a formal comment on the regulations. If I may tell you why, we're here today to endorse the proposed regulation, even though it may ultimately work to our disadvantage. I seek to call your attention to the fact that the Commission and its staff may inadvertently be preventing the competition that you seek to promote and may inadvertently be encouraging the concentration you seek to prevent. A-1 Supply, Inc. is owned, all the shares are owned by William Sye Redd. William Sye Redd until 1975 was the majority shareholder of Bally Distributing Company

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of Nevada. In 1975 Mr. Redd sold his interest in Bally Distributing Company although it is admitted he still is retained as a consultant by the company in certain instances, which is part of his compensation for the sale, which was in the form of a consulting agreement. He is, as I said, the sole shareholder of A-1 Supply, Inc., the manufacturer of the Fortune machine which is a solid-state video slot machine.

Prior to this time, in informal conversations the staff of the Commission has taken the position that because of Mr. Redd's prior contacts with Bally manufacturing that his machines may be counted with Bally's under this rule. And it thus that I say you may be preventing the competition you seek to promote. Mr. Redd or Bally Manufacturing and any of Bally subsidiaries own no stock whatsoever in A-1 Supply, Inc., and Mr. Redd's sole contact with Bally is through his agreement as a consultant and his agreement in a very minor stock interest in the company. I seek to call this to the attention of the Commission. If necessary, we will file requests for declaratory judgement with regard to this matter to clarify the status of A-1 Supply, if you believe that that would be necessary.

COMMISSIONER MERCK: Can I ask you a question.

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Does Mr. Redd's consulting agreement prohibit his engaging in competitive business with Bally?

MR. PERSKIE: Mr. Redd's consulting agreement at the present time, I don't want to answer that too quickly, because it is complicated. He is prohibited from competing with Bally in Nevada with regard to certain specific types of machines, certain video machines, certain specific machines which result from the fact that Mr. Redd bought substantial amounts of equipment from Bally at the time of his termination.

COMMISSIONER MERCK: Does he have any contingent compensation?

MR. PERSKIE: I can't answer that at this time.

COMMISSIONER MERCK: I would say I feel that the staff with what you told me, staff has probably said the right thing. I think if he truly has no links and obligations contractually or otherwise, perhaps he has stock options, I don't know. But as long as he has no strings there I think he's part of the obligations to Bally. So from what you told me I don't find anything wrong with this.

MR. PERSKIE: Commissioner, I would suggest that the A-1 Supply, Inc. which manufactures the Fortune machine which is one of the fastest growing

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manufacturers of slot machines has no ties whatsoever with Bally and, in fact, vigorously competes with Bally and on several occasions we've submitted voluminous documentation to the staff, both setting forth in great detail whatever the residual ties are between Mr. Redd and Bally Manufacturing and also showing in some detail the extent to which they've gone to compete, being on bad terms in many parts of Nevada. Mr. Redd took a substantial amount of Bally's business with him.

COMMISSIONER MERCK: If you're going to come in for a judgement we're going to have to look through this.

CHAIRMAN LORDI: I would suggest if, indeed, we do adopt this regulation your remedy is to apply for such a declaratory judgement.

MR. PERSKIE: Thank you.

MR. SLOMOFF: Mr. Chairman, members of the Commission, my name is R. Joel Slomoff. I represent A.E.S. Technology Systems, and its subsidiary, Game Plan, which is the manufacturer of slot machines. We very much

endorse the philosophy expressed by the staff, the law expressed by my colleagues. It is interesting to note that at this moment when the Commission is concerned about a disproportionate

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market share or influence of a single manufacturer that several blocks away we have one of the finest exhibits of vertical integration I can point out, the influence and presence of Bally in your jurisdiction and the effects that it will have in gaming in New Jersey. Your proposal offers an alternative to purchasers of and users of slot machines. That's a very healthy thing. I really only wanted to endorse the concept to you, the philosophy which is sound. We appreciate it. We're using it quite well. Our conversations with staff are moving along nicely. There's been technical review of our equipment. It has been approved in Nevada. We certainly have anticipated from a preliminary discussion no problem in your jurisdiction. Again, we endorse it and we hope you will act very promptly in your wisdom to adopt it today if you can. Thank you so much.

CHAIRMAN LORDI: Thank you. Is there anyone else?

MR. FOLEY: I believe that completes those of the proponents. I neglected to say just one thing, if I might just burden you for one second. This Commission's previous action with regard to its protection afforded to the Williams Company and to other competitors by mandating the use of other machines

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in Resorts International has furnished you with an excellent trial or example of the efficacy and wisdom of your rule. In that case it has led to satisfactory performance and, indeed, has just led to the reorder of 350 additional machines from our particular company. So I think you not

only have the theory, but thanks to your previous wisdom you have a trial. Thank you.

CHAIRMAN LORDI: Mr. Becker?

MR. BECKER: Mr. Chairman, members of the Commission, Stephen C. Becker, Deputy Attorney General. By letter dated June 18th, 1979 from myself to Chairman Lordi I transmitted certain comments of the Division of Gaming Enforcement with regard to the proposed regulations. I would respectfully request that these comments be considered and made a part of the record and I won't repeat them here today, except in one pertinent part where we suggested additions to the proposed regulation that would address another subject, and I'd like to read from that portion of my letter that relates to this. Specifically, the regulation itself has proposed addresses only a 50 per cent limitation and now I will quote from my letter. "We would respectfully bring to the attention of the Commission the possibility that in light of the general sensitivity of the slot machine

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industry taken as a whole it may from time to time in the future find it necessary or desirable to regulate certain other acts and practices in connection with not only the sale, but also the leasing, maintenance and repairs of slot machines in New Jersey. To that end we respectfully recommend that in addition to adoption of this proposed regulation the Commission consider adoption, either now or at some future date, of the following language that essentially paraphrases Section 5 of the Federal Trade Commission. Quote, unfair methods of competition in connection with the sale, leasing, maintenance or repair of slot machines and unfair or disceptive acts or practices in connection with the sale, leasing, maintenance or repair of slot machines are prohibited, unquote."

I feel this is a statement which is self-explanatory, but essentially what we seek to accomplish here would be to

address the attention of the Commission not only to the 50 per cent aspect, but also to certain other acts that have been addressed in briefs submitted by counsel for respective parties that are undesirable and anti-competitive. This provision would give the Commission the power and the authority to the extent it doesn't already exist to

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address those particular practices without being overly specific at this time, and in the event it's felt necessary to do so in the future that can be done, that is, specifically objectionable acts and practices such as tying arrangements, exclusive dealing arrangements and so forth can be addressed. Thank you.

CHAIRMAN LORDI: Mr. Becker, I would suggest you work with staff on drafting such a regulation. I'm not saying we would adopt it, but I would think the proper procedure would be for you and other members of the Division to sit down with staff to see whether or not it warrants a recommendation from the Casino Control Commission. I would not at this time think that the Commission ought to consider it since we would then have to republish our rule.

MR. BECKER: It has been discussed to a certain extent with the staff.

CHAIRMAN LORDI: It's not part of our proposed regulation at this time.

MR. BECKER: That's correct.

CHAIRMAN LORDI: I suggest you meet with staff and discuss it with them and if staff is of the opinion that the recommendation should be made, of course, they will.

MR. BECKER: This seems to be the appropriate

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forum to bring this to the attention of the Commission formally.

COMMISSIONER MERCK: Mr. Chairman, on Mr. Becker's suggestion, I wonder if it's the feeling of the Commission as to whether it would require publication or republication inasmuch as it is not a substantive change, as the Administrative Practices Act I think would require us to republish. To me it sounds more explanatory or enforcing of what is already in there. It's a slight expansion. But as far as I'm concerned if he wants to or if we wanted to add it to the proposal I don't think there would be either a legal objection or I certainly don't have any objection to it as it's stated. I have read it previously.

CHAIRMAN LORDI: Commissioner Merck, I think it would be a substantive change in the regulation. There is no question in my mind. I'll defer for a moment to general counsel and see what he has to say.

MR. COHEN: I just discussed that very question with Mr. Santaniello and we're in agreement it would be a substantive change that would require republishing. However, it's certainly quite possible that if it's the will of the Commission the regulation in its present form could be adopted and this proposed

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amendment or addition thereto could be published and in due course if the Commission saw fit to adopt that, adopt it at a later time.

CHAIRMAN LORDI: But I would think that counsel and staff ought to have an opportunity to review it and be in a position to make a recommendation.

MR. SANTANIELLO: I received a copy of the letter, but I think it does, indeed, expand what this regulation calls for. I feel that some time should be given to staff and to the Chairman to make some decisions with respect to it. But we can assure you, Commissioner Merck, we'll look into it.

COMMISSIONER MERCK: Fine.

COMMISSIONER DeBONA: Wouldn't the FTC have jurisdiction anyway of unfair competition?

MR. COHEN: I'm sure that it would, Commissioner. I assume that this proposed amendment would merely wish to expressly confer that authority on this Commission to make it clear we intend to exercise that authority.

CHAIRMAN LORDI: Is there anyone else who would like to be heard in support of the regulation? If not, Mr. Cummis.

MR. CUMMIS: Mr. Chairman and members of the Commission, I would like to introduce to you this

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afternoon Professor Louis B. Schwartz, who is a nationally recognized expert in the field of anti-trust law. Professor Schwartz has written extensively and lectured extensively on the subject. He has been a consultant to the FTC in Washington. He has served with the Attorney General of the United States Committee on Anti-Trust Laws. He is the Benjamin Franklin professor of law at the University of Pennsylvania School of Law, and he is a university professor at that university. He'll address himself to the subject of the regulation and some suggestions that he might have for possible alternatives to the regulation agreeing, I think, as Bally has agreed in its papers submitted, that this is a legitimate concern and our only difference with the Commission's concern is its approach. Professor Schwartz.

CHAIRMAN LORDI: Professor, would you state your full name, for the record?

PROFESSOR SCHWARTZ: Louis B. Schwartz, University of Pennsylvania, Philadelphia.

Despite that glowing introduction, members of the Commission, I'm here as a lawyer. On the other hand, I think it fair to say I'm here as a somewhat distanced lawyer.

Mr. Cummis, I needn't tell you, is a very effective advocate for Bally and I have

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a very limited assignment. That is to discuss with you how the Commission can effectively and realistically promote competition and protect the consumer interests in New Jersey and Atlantic City specifically. I'm not going to discuss the commerce clause or the due process clause or constitutional law issues or the authority of this Commission. I have worked in the federal government, both in administrative bodies and in the Department of Justice, and I think that speaking to commissioners I ought to be concerned with the merits of the proposal.

Questions of constitutional law and commerce power and preemption may have to be gone into in litigation later. But I know if I were advising the Commission at this stage beyond a general admonition not to take too much in the way of a risk, I wouldn't decide against the Commission's power until the courts have told me not to go ahead. So I'm concerned really with how you may effectively, realistically promote competition which is your statutory mandate without a doubt and promote the protection of the consumer interests. In the midst of this chorus of approval from competitors of Bally it takes some temerity to say that I think the Commission has embarked upon precisely the wrong course to promote competition

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or to protect the consumer interest.

Unless the decision here was foregone, I emplore you to reconsider the fundamental basis of this, not the details of it, but whether, indeed, it is pro-consumer and pro-competitive to assign 50 per cent of a market to those active and able gentlemen. That is what this regulation is about. It does not permit competition. Competition is permitted now. It does not offer people an opportunity. The opportunity exists now. It ought to be related to obstacles which

Bally has placed in the path of competition that are not obstacles of superiority of product and service, and we haven't heard anyone address themselves to that. The most fundamental distinction made in the law concerning monopoly and concentration is the distinction between getting most of the customers because you're the best and getting most of the customers because you throw bananna peels in the path of your customers.

Now, it's true there have been some allegations of the latter, but there has not been any hearing, and I would ask the commissioners to ask themselves whether they can with any reasonable certainty say that the reason that Bally has such a large following is anything other than Bally produces a better product, gives better service and is willing

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to go on doing that and is trusted by the customers in that regard. These are not unskilled customers, and I ask you to take note that none of these customers which are mainly the casinos are here supporting the 50 per cent regulation. Indeed, they came in and had asked for exceptions to it and it is clear that they are accepting this only as a condition to operate. You can force it down their throats, but they, as really representing what the consumer in this industry wants, they want freedom to choose.

You have heard from a whole of their competitors who do not want freedom to choose. They want Bally excluded for 50 per cent of the market so that the casinos are not free to give the public what the casinos, in their business judgement, would prefer to give their public. And why would the casinos prefer to give that to the public? Because experience has told them that the public finds the Bally machine more attractive. And what is the consequence of that for the state? The state gets more revenues insofar as a better, more attractive product is used by the free choice of the customers, both the casinos and the persons who patronize the casinos. Now, I've already indicated, as Mr.

Cummis has, that there is absolutely no quarrel with the concern of the Commission

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when they confront for the first time a situation of an important supplier who has an 80 per cent following. If I were still in the anti-trust division I would be very concerned and I would like to look into it. It's an imaginative proposal to come up with this 50 per cent rule as we are told to permit competition, although how it permits it I don't understand. It excludes competition from 50 per cent of the market. Still it's an imaginative beginning and it bases upon which the Commission might after deliberation decide to adopt an effective move towards eliminating any leverage whatsoever that an 80 per cent supplier has, even if that leverage is due to consumer following.

Now, how would you eliminate that leverage other than by the drastic and rigid allocation of market, which is contemplated in the 50 per cent rule? How would you make sure that there was an opportunity freely to compete on the basis of product quality and service? You would follow the lead of the traditional anti-trust law supplemented by the suggestion made a few minutes ago by the Division of Gaming Enforcement, you would adopt the rules that said there shall be no leverage exerted upon casinos in any way for them to continue to use Bally's machines over

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anybody else's. There's been no showing that any such leverage was ever used. On the contrary, the customers have come in and said please, let us patronize Bally. But if there is any concern and there is a proper concern when you see somebody with a large following like that, if there's any concern what you want is a law saying Bally and, indeed, anybody else shall not have an exclusive dealing contract with any casino, express or implied. Now, that's the kind of thing you find in the Clayton Act of 1914.

CHAIRMAN LORDI: Professor, can I ask you a question. I'm looking at the proposed regulation B and C and it says the Commission may modify the said limitation of Subsection A upon a finding that the casino licensee or applicant or casino licensee has made a good faith effort to seek and obtain slot machines from more than a single manufacturer and the number of adequate slot machines sufficiently complies with the said limitation is not available for said use in the casino. Assuming that a casino licensee or applicant thought he could not find adequate machines it seems to me that this proposed regulation gives him the right to come before the Commission and say the only machines that he can use on his casino floor are Bally machines. And we will

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hear it.

PROFESSOR SCHWARTZ: I'm sure you would.

CHAIRMAN LORDI: Then someone would have to have the burden to show that either their machines are adequate to serve the public or they are not, so there is a remedy here.

PROFESSOR SCHWARTZ: There is a remedy. It seems to me, Chairman Lordi, that what that arrangement amounts to is we will start down the wrong track and then if we have made a mistake, you can always come back and ask us to correct it.

But there is more than that wrong with the section you have just read. I thought when I read it first that it was unacceptable to say that adequate machines as an alternative had to be bought. That is to say, not machines equal to the best that the consumer can buy, that the casino can find, but that he must go to the, quote, "adequate alternatives" even if he would prefer something else.

In the second place, as I sat through this long day, in which it was evident that the Commission is tyrannized by

the urgent overall — its opportunities to give extended deliberation to the important, I really wondered what you were buying in that provision. You're going to have litigated here whether the other

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machines were adequate, and does adequate mean as good as Bally offered? You're going to have litigated here the crazy issue of good faith effort.

Now, anyone who has been in a law court knows that that is simply an invitation to litigation. Satisfactory of reasonable terms, available on satisfactory or reasonable terms, should that be something that is submitted to you for litigation? You're available. How about that one? Is it available if it's available within three months, within a year? Is it available if it's available within the form of a box, but no service? You are simply asking for litigation, and on the wrong side, because you have perfectly effective alternatives, which is the right way to go about assuring, if any assurance is needed, that you really have free opportunity here.

On the other hand, if you are ready to hand out a government monopoly to 50 per cent of the market, free of the competitor who has been shown to be the most effective, then, indeed, declare an enclave of 50 per cent in which Bally cannot operate and in which the casino cannot go and buy the thing it wants. Indeed, as was suggested by the Chairman, why not make it 75 per cent, or 95?

The answer that was given to your question,

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Chairman Lordi, would have sustained 95 as well as 50, or 40. It is, indeed, an arbitrary allocation.

I have no question in my mind whatever that 30 must be very satisfactory, as it was characterized on my left. Who wouldn't be glad to get 50 per cent of the market free of the most effective competitor?

But I ask you if that is: a, the American system; and b, competition?

Now, I would like to go on, if I may –

CHAIRMAN LORDI: By all means.

PROFESSOR SCHWARTZ: – to a discussion that arises out of my experience in the anti-trust division in my 30 years of study of this problem: what is this concentration we are concerned about? It is clearly not the law that anybody who has 75 or 80 per cent, or even 90 per cent, of a market is a monopolist. In a loose sense, in a popular sense, he can be called a monopolist. But the essence of monopoly, and all the decisions have made this perfectly clear, is not that you have a following, but that you prevent anybody else in some unfair way from going after that following.

Now, nothing has been shown here. The commissioner surely cannot say to themselves we have faced that alternative, we are satisfied that it is because Bally threw obstacles in the paths of its

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competitors and not because Bally was a superior supplier. You haven't addressed the issue. And if you haven't, why should you create a governmental restraint of trade for the benefit of the unsuccessful competitors?

Now, I should like to just remind you of some illustrations of one supplier – and here we don't have one, of course, we have numerous – but one supplier situation, which everybody recognizes is perfectly lawful and nothing ought to be done about it. In the first place, the first firm that arrives in any market is obviously going to be a "monopolist" until other firms enter that market, he is the only supplier. Nobody thinks we ought to put a penalty on being first in the market. And as I tell my classes, the last one in the market is monopolistic, too. If you're making horse shoes and everybody else gradually drops by the way-

side and finally your last competitor quits, you are a monopolist. You ought to have a criminal prosecution, I have no doubt, for monopolizing the remaining market.

In any number of towns in the United States there is one newspaper, the so-called one newspaper town, a natural monopoly, it is said. I am known generally as an anti-monopoly figure, and so I have a

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little question mark about these one newspaper towns, but there they are. They're the surviving newspaper, and people don't do anything about it, because considering the narrow market involved and the economics of the situation and the failure to put any obstacle in the way of any other newspaper that wants to get established, there is nothing wrong here. It's the way the competitive system operates.

And then there is the question of style leaders. I know the commissioners have read my general memorandum, and I hope you have this outline of my oral presentation —

CHAIRMAN LORDI: We do have it.

PROFESSOR SCHWARTZ: — because seeing how busy you are, I think maybe it's useful to have just the headings before you sometimes. But it's very clear that there's something peculiar in this business. I myself inquired about it. Why should people be so interested to line up beside Bally? Well, there is such a thing as style operating here. Bally had no luck at all until it hired certain designers, and then it did very well. It was losing out in England, and suddenly with this new design it became the top, and then it lost that position, showing that Bally doesn't have an external monopoly power, but

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maintains its position because it is a style leader. The consumer is attracted by the design, I mean the external design of the machine. The consumer is attracted by novel and inventive ways of betting, like daily double betting at

a racetrack and an exacta, and all that. The consumer is influenced by the ease of manipulating the machine.

Now, if you are bringing out new designs which attract consumers, you are likely to be the market leader, and you are also quite vulnerable to losing that market leadership, and anybody in that position is not a monopolist.

There have been extensive studies done of so-called rank shift analysis showing that somebody always has to be first. But if you show that the first position goes sometimes to A and sometimes to B, you are not talking about a baneful monopoly, you're talking about successful competition.

One of the most famous judges in the United States, Learned Hand, once addressed himself to this issue when he was talking about an aluminum company, and he said it would be a strange thing if by law we set up a competitive race and then when somebody won it we said you're a felon, you're a monopolist.

Again and again the point is driven home that

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to make a rational decision about whether somebody is a baneful influence in the market or, on the contrary, a successful competitor, you have to address that issue. You have to find out—

COMMISSIONER DeBONA: Excuse me, sir.

Are you suggesting that we are aiming this regulation at any one individual?

PROFESSOR SCHWARTZ: In the sense that you have it in for Bally, I wouldn't for one moment suggest that. But in the sense of who is going to be hit, there is no question about that. Bally has the leadership, and this Commission has tentatively made the judgement to give half its business to other people, without for one moment finding that they have done anything wrong in getting their leadership.

It is perfectly consistent with the record before you that Bally achieved its leadership by effective service to casinos and to the public. Indeed, we have—

COMMISSIONER DeBONA: We don't have a record, sir. You pointed that out.

PROFESSOR SCHWARTZ: Maybe I used the wrong term. I'm taking documents which have been filed with you, including a letter filed with Mr. Santaniello, by the head of Caesars, who said, Bally

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has always proven through continual upgrading of their lines and technical research to be in advance on the reliability factor. There still does not exist a machine of equal quality or reliability. I emplore you not to penalize us or the New Jersey customer by wishing to choose the best available machines on the market.

That comes from a customer. No customers are here—

COMMISSIONER DeBONA: Nobody has been cross-examined, either.

PROFESSOR SCHWARTZ: Again, and if you're to have a proceeding like this one, which in form is a legislative proceeding, a rule-making proceeding, if you're going to have that. But it's perfectly obvious that what you're going to have to do is to take half of somebody's business and assign it to somebody else, the courts will not for one moment fail to examine the adequacy of the record, and not merely its adequacy on the legislative basis, because I'm ready to concede that you have heard comments, and all that. There is nothing you can do more if this were really a rule having general application and not simply directed to getting part of Bally's business, the record would be adequate.

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CHAIRMAN LORDI: Professor, can I call your attention—now, you have been talking in terms of monopoly,

and it may very well be that one of the considerations—I'm looking at the section of the statute, 5:12-112 of the Act, which states, among other things, and it goes on to say, "The regulatory and investigatory powers and duties conferred by this Act shall include the power and duty to regulate, control and prevent economic concentration of the casino operations and the ancillary industries regulated by this Act." To "prevent economic concentration," that's what this statute says, to prevent it.

So the point I make is this: that if, indeed, what the statute tells us to do is prevent economic concentration, how do you go about doing so unless you do it with a regulation of this kind?

PROFESSOR SCHWARTZ: That raises a question—

CHAIRMAN LORDI: How would you interpret it?

PROFESSOR SCHWARTZ: I may say that anti-federal law says it shall also be the duty of the United States Attorney to enforce and to seek injunctions preventing as well as undoing evil. But I submit to you that the statute cannot be read as calling upon you to prevent customers from preferring some

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machines to others if that leads to most customers preferring X machine. Concentration here must be read within the anti-trust tradition as preventing concentration which is a distortion of the market, which frustrates the consumer preferences, which prevents some people from buying what they want or dealing with whom they wish.

Now, in our situation the only threat to customer freedom is the 50 per cent rule. You are about to adopt a restraint of trade, and it would not be the first one, in an era when the federal government is committed to de-regulation, to withdrawing from the field of allocating truck lines to this person and that person, airlines to this

person and that person. After 30 or 40 years of experiment with that kind of government, intervention deregulation is the mood. Nobody thinks that allocating the market is the way to protect the consumer—

CHAIRMAN LORDI: That may be the direction the federal government has gone, but not our state legislature. They have mandated our preventing economic concentration—

PROFESSOR SCHWARTZ: Preventing economic concentration, which is the best thing to do and which does not mean penalizing the winner of the competition;

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and they have mandated preventing economic concentration, and that cannot mean if most consumers prefer X, you make sure they don't get what they prefer.

Surely, in reading preventing economic concentration otherwise, preventing economic concentration from unfair methods of competition that interfere with consumer choice. I underline that, that the prevention of economic concentration does not mean preventing consumers, whether you're thinking of players or casinos, from pursuing their choice.

In the first place, that's a maximization of liberty; and in the second place, it's the best way to provide revenues for the State of New Jersey.

CHAIRMAN LORDI: Except that we are building a new industry here in New Jersey. We are starting from the ground floor. And it would seem to me that in starting from the ground floor we have got to take a position with respect to an industry which has, indeed, been monopolized by one company or one corporation.

How do we go about doing it? How can we give other companies that manufacture slot machines the opportunity to break into that business from the ground floor?

When I say a new industry, a new regulatory

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process. It's something brand new. It is not as if we have been here for years and suddenly thought in terms of promulgating a regulation of this kind. But we have a statutory mandate to prevent economic concentration. We are a new industry, we are a new regulatory agency. We want to see that everybody has that kind of opportunity.

We know that yes, Bally does indeed sell 85, 90 per cent, 80 per cent of the market. Now, how do we go about regulating it?

PROFESSOR SCHWARTZ: If I can pick up, first, another aspect of what you just said, Chairman Lordi.

You asked me to concede that Bally is a monopoly –

CHAIRMAN LORDI: I didn't say a monopoly. I said that statements have been made to the effect that they do indeed sell 80 to 85 per cent of the slot machines that are –

PROFESSOR SCHWARTZ: That I am not quarreling with. But if I tried to make any point, it is that that is not an undesirable situation, absent proof that it's representing other than consumer choice, and that proof has not been made.

Now, when you ask me how do we go about maximizing or giving them, as you put it, an

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opportunity, I ask, who has denied them the opportunity? The only people who have so far denied them an opportunity, in quotes, are the customers. The customers don't like them as well as Bally.

Now, it may be that the government ought to step in and say, You customers don't know what's good for you, we will tell you what to buy. But nobody has denied that these people have an opportunity, and this regulation is not permitting competition, it's restraining competition.

Competition, so far as this Commission knows, prevails, and all that's said here is that we will block out one competitor.

Now, I ought to answer your question directly, Chairman Lordi, and that is that in order to maximize opportunities here, you ought to adopt regulations preventing exclusive dealing, preventing tying, prohibiting unfair methods of competition in the sales of leasing and servicing, anything like that. Indeed, I would go further. It would be a rather unusual aspect of relief in a so-called anti-trust case, but you could always impose upon a firm like this obligations of dealing, affirmative obligations of dealing on a parity with all customers like a public utility. Public utilities cannot pick and choose among its customers.

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If you are fearful of Bally's situation that it might discriminate among its customers, though there has been no evidence of that, you could adopt and impose that most unusual thing in the private economy an obligation not to pick and choose at all among your customers, but to serve alike all users. So there are methods other than a 50 per cent restraint of trade imposed by the government to assure freedom of competition. And I repeat, the 50 per cent rule is in itself a restraint of competition imposed by the government. And in the classic tradition, we study the origins of anti-trust law in our classes, and 350 years ago the problem was that people were handing out in the royal courts of England, the government was handing out monopolies to sell playing cards. Why? Because they said it was good for the people, there wouldn't be so many cards played, you know, if distribution were restricted.

There is always a pretext for the government stepping in and sort of interfering with free consumer choice. The purpose of preventing concentration is a purpose to prevent other people from interfering with freedom of choice.

That's what the monopoly laws are about. The government ought not to interfere with freedom of choice, unless absolutely essential.

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But the monopoly laws come along and say don't any of you private people interfere just because you get so big and powerful that you can't decide who is in and who isn't in business, don't interfere. That is a proper occasion for intervention.

It is not a proper occasion for intervention and reordering consumer prices that a lot of hungry would-be competitors who are not restrained by anything shown in the record would like to have handed over to them by the Casino Control Commission a free territory of 50 per cent.

COMMISSIONER MERCK: Let me ask you one question in particular. Rather than talking monopolies generally or anti-trust generally, we have a unique situation, at least so far as I know in this state as opposed to a trucking regulation, we'll say, where General Motors would own the truck line, we have a casino applicant potentially who owns the manufacturing also. So then in addition to market domination for whatever reasons, we also have an integrated company in competition. Did you consider this in part?

PROFESSOR SCHWARTZ: I certainly have and there can be no question that just as 80 per cent following is sort of something you look at and inquire

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into, so vertical integration is something that you ought not to ignore. In this situation, however, there are certain special reasons that you must take account of. One of them is that the most likely entrance into production of machines are these big powerful casino operations. Harrah's in Nevada is in the manufacture and — I better not say that, but

I doubt if it's bought machines to any considerable degree. It certainly manufactures them. Resorts, I believe it was, was in the process of integrating with Williams at the time that the initial idea of 50 per cent was borne and, of course, that would have been a very good way for Williams at that time to get government granted 50 per cent share of the market. If you consider the casinos as likely entrants, the one thing you don't want to do is to prevent vertical integration.

Now, on the other hand, if vertical integration is to be permitted then why interfere with something unless it's shown to be baneful, if it is to be permitted, the one thing you really must do is to follow the suggestion of explicitly penalizing unfair practices, discriminatory practices, exclusive dealing requirements, tying arrangements, in other words, make everybody play fair.

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COMMISSIONER MERCK: When we started over a year ago there was difficulty of obtaining slot machines, just the plain physical problem of supply. What appeared to some of us, anyway, myself, certainly was that we were in an effectively a one supplier situation. Baneful or not, this strikes us as being beyond the control of the manufacturer and is to me a perilous position to put an industry in which is trying to get off the ground.

PROFESSOR SCHWARTZ: I think any industrialist would, if he could, have dual sourcing. The question then arises why do these powerful customers not do it. The situation to which you refer, Commissioner Merck, I really don't know what it was, but it seems to me that at the time of tremendous expansion and demand there would inevitably have been a temporary shortage. At that time part of the shortage would be made up by sales by Williams and others. Notably, some of that shortage was made up by foreign suppliers, Bell in England and the Australian

interests and the Japanese interests, and that brings me to another point in my outline, when you are handing out this government protected area of competition I think you ought to reflect on to whom you're handing it out. The likelihood is that Bell, much bigger than Bally and

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selling everywhere, that Ainsworth which in its own comments here reports it sells in Sweden and Egypt and everywhere, a whole list of countries, what you're going to do is to foster not competition, but a duopoly, that is to say, a concentration in two or three, sometimes three, and these other people will be farther from your reach as a controlling agency. You're going to create a protected market for these foreign firms. How are you going to exercise your supervision over them? You're not even going to be able to exercise a fair trade control or fair competition control because you will have difficulty. You can send people abroad and try to investigate. I remember in the anti-trust division we tried and not too successfully to break into information sources in foreign countries.

COMMISSIONER MERCK: I think we're slightly different than that. They must be licensed as a casino industry in this state.

PROFESSOR SCHWARTZ: Right. But you have the problem of ascertaining the influences in them abroad as you do here.

COMMISSIONER MERCK: We have casinos that are foreign owned too, but we're going to control them because they must set up subsidiaries and be licensed

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under the state's regulations.

PROFESSOR SCHWARTZ: Commissioner Merck, I'm not denying that you can do it. I'm saying only what I doubt that you would disagree with, that it's not as easy

when you're dealing with foreign firms as with domestic firms. Then why do you want to encourage production of machines in England and Japan and Australia rather than here? Bally itself has a warehouse right in Atlantic City and undoubtedly will, as the market develops here, be producing in New Jersey. Why do you want to create markets for Bell and Ainsworth of Australia and so on. They are the most likely, other than the casinos, and this gets back to your vertical integration point.

CHAIRMAN LORDI: Doesn't Bally sell overseas?

PROFESSOR SCHWARTZ: Indeed it does. It's a world market, and for that reason, Chairman Lordi, the 80 per cent figure is very, what shall I say, dubious. Because if you talk about having 80 per cent locally when the market really, when the buyer has alternatives all over the world, you really ought to be saying what percentage of the total available supply which includes Australia and Japan and England does one firm have. Are we, therefore, justified in taking away their business. For whom? For these foreign

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firms. Well, I won't prolong this.

CHAIRMAN LORDI: It's been an interesting discussion.

PROFESSOR SCHWARTZ: I have an author's pride in my parable of the horse that won too many races, but it's attached to my outline and if you would look at it you will see that to me this whole squabble suggests the terrible concern that arose after this horse named Lightning won all the races in the last three years and somebody came up to Lightning and said it's a monopoly and we ought to do something about it and what should we do. Ultimately the idea was let's make a rule that he can't win more than 50 per cent of the races. That solves it. Of course, some of the bettors wondered who was going to decide who was to

be second, you know, and who was to be third in the other 50 per cent and might just destroy the general character of a contest which is a horse race. But nevertheless, it would break up the monopoly. In my parable which has to do, of course, not with this Commission but with something called the Sports Regulatory Commission, I left the Commission cogitating that one, as I leave this Commission cogitating. Thank you very much.

CHAIRMAN LORDI: Thank you.

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MR. FOLEY: Mr. Chairman, just if I might, in my desire to expedite this hearing and not burden this body with excessive verbiage I perhaps gave away more than is warranted. I suggest that the delightful professor has just given us another example, as is his memo, of a completely unsupported, self-motivated and self-sustained bit of rhetoric. He would have you believe that style somehow or other, he has become an expert in style, which is a motivating factor. He would have you believe that he is now able to speak for all of the casino operators who have not appeared here this morning, and I suggest he is not able to speak for them. I suggest that your record contains a statement from Walter I. Rogers, the executive vice-president of Resorts International. Quote, and this has been forwarded to the Chairman in a letter. In reply to your questions I am pleased to tell you we are and have been very satisfied with the performance of the Seberg slot machines, both as to earnings and acceptance by the players. They certainly compare favorably with the other equipment in the marketplace to date. We go on. Caesars, incidentally, says six Seberg slot machines have had a slightly higher handle than six Bally slots. All of this is not only in the record, but completely

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ignored by the professor's remarks.

Now, he also would have you believe and he would have you discount as simply an allegation, facts which we set forth and I will not burden the record. It is in the record under Point 1 as to Bally's position and how is it obtained. That is in the record and it's available to you, not addressed by Professor Schwartz in any way. He would have that blow away. I repeat that the proof is also in the actions of the people. If further proof is necessary look at the actions of Resorts who, following the invitation to competition ordered by this Commission, have just now reordered 350 machines, not from Bally, but from Williams. I suggest furthermore that the veiled threat of extensive litigation has no more, as I stated in closing, has no more effect upon us and I'm sure it will have no effect upon you. Thank you.

CHAIRMAN LORDI: I would agree with you, Mr. Foley, that the fact that any decision of ours may be litigated to the courts is not going to affect our decision. We will allow the courts to make that determination. I do recall that back about a year, year and a half ago when we were considering Resorts International and eventually adopted a policy of 50 per cent, the 50 per cent rule as we know it, were it

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not for that 50 per cent limitation on the purchase of slot machines from any one manufacturer these other manufacturers would not have had that opportunity. I'm also aware of the fact that the only casino we have in operation here in Atlantic City, forgetting Caesars or Boardwalk Regency for the moment, since they are not in operation, although they have a temporary permit, that to my knowledge, we have received no complaints concerning the adequacy of the machines themselves that were supplied from Resorts International by manufacturers other than Bally. So it would seem to me that the policy that had been

established by the Commission and is now incorporated for a proposed regulation has, indeed, worked to prevent economic concentration, and I read that phrase exactly as it sounds, that is we're mandated to prevent economic concentration. We're a new industry, as I pointed out previously, and it seems to me now is the time to do it. If we wait until tomorrow or a year from now or two or three years from now it may very well be we'll lose the ability to prevent that kind of concentration. This is what the legislature wanted. This is what I think we ought to do as a Commission and the Statement of Policy that was prepared by staff in which they point out, among other things, on page 2

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that the interest of the state in adopting this regulation is grounded in several conditions. First, the regulation would ensure a certain degree of competition in the slot machine industry within the New Jersey market. I don't think there is any question about that. The regulation would also serve as a continuing incentive for new companies who enter the market and for existing companies to enhance the quality and customer appeal of their products in order to maintain and increase their respective market shares. I think that's been proven in the past. Next the regulation would inhibit economic concentration in the gaming industry in New Jersey accruing from such concentration and finally the regulation would prevent the very real and practical dilution of the state's regulatory power which would result in the casino gaming industry to be dependent upon any single slot manufacturer. That would, indeed, happen were it not for the fact we had such a policy in existence. I for one as Chairman and as a member of this Commission suggest to the other members of the Commission that I, indeed, think this is not only an excellent regulation but I think carries out the statutory mandate to

prevent economic concentration and I would recommend its adoption. I will accept

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a motion.

COMMISSIONER CORSEY: So moved.

CHAIRMAN LORDI: There is a motion we adopt the proposed regulation that has been the subject of discussion. Is there a second?

COMMISSIONER DeBONA: Yes, I'll second it.

CHAIRMAN LORDI: It's been seconded. Any comment on the motion?

COMMISSIONER MERCK: Mr. Chairman, one of the things that I believe Professor Schwartz made a strong point on had to do with the fact that the opportunities for, I believe he said, competition exists now. It's my distinct impression that within recent time that this has not been really demonstrated, at least here in this state, and I was wondering if any of the proponents of this had any comment on whether they felt that opportunities, competitive opportunity did, in fact, exist, and if it did, why weren't they out there busily chipping away at this 80 or 79 per cent.

MR. FOLEY: Very briefly, responding only on behalf of one, they are chipping away, as you put it. The market has been limited also. I do refer to and I suggest rather than belabor this meeting any further, I do refer in some 16 pages of our brief to the inhibiting factors that have been brought about

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by Bally and which, I suggest, is a direct result of that situation as we find it today.

COMMISSIONER MERCK: So what you're saying, at least from your client's point of view, is the opportunity was not there. Do I read you right?

MR FOLEY: That's correct. Except for that afforded by this Commission.

COMMISSIONER MERCK: Excepting that.

MR. FOLEY: Yes. Thank you.

COMMISSIONER MacDONALD: Could I refer everyone again to the Statement of Policy that was developed by our staff. Could we address the last paragraph, the first quarter of that. I'd like to get an interpretation. You know I'm not a believer in government fixing anything. However, it says, I believe the means by which the regulation seeks to accomplish these goals is to place an initial limitation on the percentage of machines from any one manufacturer that can be placed on the casino floor at any one time, correct? That is an important statement to begin with. Now we go on to talk about a limitation of 50 per cent, but it does not, I think you brought this up, it is not absolute and can be increased; is that correct?

CHAIRMAN LORDI: That's correct.

COMMISSIONER MacDONALD: I don't think we

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really elaborated on that. Here again, we were talking about something brand new in this area and I do think it has not, those of us who are business oriented, I certainly haven't felt the competition has really done very much to help themselves in this field. You are now. It's coming along. But at least we have not been privy to what has been available in the market other than the one we're talking about. I'm talking about the development of machines. I'm excited to hear that some things are happening. Perhaps this move on the part of this little Commission might encourage much more development and effort on the part of the competition in this field. It's a shame it has to happen this way. I would like to have seen this been done anyhow, follow me?

MR. FOLEY: Yes. You also have before you or coming before you shortly a request to introduce into New Jersey a new and quite refined machine. This is not before you now, but it is pertinent to the remarks of the Commissioner.

COMMISSIONER MacDONALD: As an example, I would like very much as a Ford dealer for the government to say Hey, General Motors, you can't have more than 50 per cent of the market. Boy, that would be great. Then I'd also like the government to say Hey, no imports,

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because that's all that's selling, imports. I don't think government belongs in it, but I can understand the position here and I'll support it, Mr. Chairman. But I wanted to go on record with my feelings with respect to the competition.

CHAIRMAN LORDI: Thank you, sir. Mr. Band, will you call the roll.

MR. BAND: Commissioner DeBona.

COMMISSIONER DeBONA: Yes.

MR. BAND: Commissioner Merck.

COMMISSIONER MERCK: Yes.

MR. BAND: Commissioner Corsey.

COMMISSIONER CORSEY: Yes.

MR. BAND: Commissioner MacDonald.

COMMISSIONER MacDONALD: Yes.

MR. BAND: Chairman Lordi.

CHAIRMAN LORDI: Yes.

There being no other items on the agenda, are there any members of the public who would like to be heard? Before the public, Commissioner Merck.

COMMISSIONER MERCK: I refer to Section 72 of the Act which requires this Commission to make its annual report to the legislature and to advise the governor and the legislature as to its recommendation for any improvements or otherwise having to do with

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CERTIFICATION

We, EDWIN SILVER and ALAN L. LESKY, Certified Shorthand Reporters and Notaries Public of New Jersey, do hereby certify the foregoing to be a true and accurate transcript of our original stenographic notes taken at the time and place hereinbefore set forth.

/s/ EDWIN SILVER

Edwin Silver, C.S.R.

/s/ ALAN L. LESKY

Alan L. Lesky, C.S.R.

June 25, 1979

STATEMENT OF POLICY
(Pre Publication)

The Casino Control Act places on the Commission the responsibility to encourage and preserve competition and to control and prevent economic concentration in the casino operations in Atlantic City and the ancillary industries related thereto. This duty is specificially set forth in section 5:12-1(12) of the Act which states:

> "Since the economic stability of casino operations is in the public interest and competition in the casino operations in Atlantic City is desirable and necessary to assure the residents of Atlantic City and of this State and other visitors to Atlantic City varied attractions and exceptional facilities, the regulatory and investigatory powers and duties conferred by this act shall include the power and duty to regulate, control and prevent economic concentration in the casino operations and the ancillary industries regulated by this act, and to encourage and preserve competition."

In setting forth this and other obligations of the Commission, the Legislature also provided the Commission with powers consonant with its broad range of duties. Illustrative of this is the authority of the Commission "to adopt, amend, or repeal such regulations, consistent with the policy and objectives of this Act, as it may deem necessary or desirable for the public interest in carrying out the provisions of this Act." *N.J.S.A.* 5:12-69(a). Similarly, the Act permits the Commission to "exercise any proper power or authority necessary to perform the duties assigned to it by law" and further provides that "no specific enumeration of powers in [the] act shall be read to limit the authority of the Commission to administer [the] act." *N.J.S.A.* 5:12-75.

Seeking to effectuate the policies of the Act and to fulfill its statutory mandate, the Commission finds a present and compelling need to impose specific regulatory controls to prevent economic concentration and to further com-

petition in the slot machine industry is of prime importance since slot machines directly account for a substantial portion of the gaming revenue derived by a casino. The information presently before the Commission clearly indicates that there is a paucity of effective competition within this industry. The manufacture and supply of slot machines appears to be dominated by one manufacturer which holds an overwhelming share of the national market. Based on the experience gained thus far, it is also apparent to the Commission that a real potential exists for extending this economic dominance to the Atlantic City market.

The Commission further finds that it would be undesirable for the Atlantic City market to be dominated and controlled by a single slot machine manufacturer. Such a result would create a dependency on that manufacturer and reduce competition in the casino industry in this state. The undesirability of such a situation is further compounded by the fact that the manufacturer who presently dominates the domestic slot machine market is also an applicant for a license to operate a casino in Atlantic City. Thus, there is the potential for this manufacturer to be in direct competition with other casinos while, at the same time, having the New Jersey casino industry dependent on it as the major supplier of slot machines.

In addressing this subject, the regulation below seeks to avoid economic concentration and to stimulate competition by compelling casino operators to seek suitable machines for use in the casino from more than one manufacturer. In this way, it also seeks to broaden entrepreneurial opportunities in the slot machine industry and to create a dispersion of economic power with respect to the casino industry in Atlantic City. Additionally, it endeavors to create a greater multiplicity of choices for purchasers of slot machines and potentially more diverse gaming opportunities to the slot machine player by providing machines manufactured by different suppliers.

The means by which the regulation seeks to accomplish these goals is to place an initial limitation on the percentage of machines from any one manufacturer that can be placed on the casino floor at any one time. This percentage limitation, however, is not absolute and can be increased, conditioned or otherwise modified by the Commission if a casino operator can present valid and justifiable reasons that warrant a subjugation or relaxation of the purposes and policies underlying the regulation.

CASINO
CONTROL
COMMISSION
DOCKET NO.

IN THE MATTER OF PROPOSED
RULE 19:46-1.32 "LIMITATION ON
UTILIZATION OF SLOT MACHINES
OF ANY ONE MANUFACTURER"

MEMORANDUM

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INTRODUCTORY STATEMENT

These comments are submitted on behalf of Bally Manufacturing Corporation with regard to proposed Rule 19:46-1.32, limiting a casino licensee generally from utilizing the slot machines of any one manufacturer for more than 50% of the licensee's slot machines.

We have attempted to address ourselves to the proposed regulation not as adversaries or advocates, but as parties who share the Commission's legitimate concern with keeping industry honest, competitive, and serving the best interests of the consumers, in this instance the citizens of the State of New Jersey. In that regard, paramount interest should be directed to carefully drafted, stable, long-range resolutions that will determine or at least help guide the course of the casino industry in New Jersey for many years.

Our comments here will focus upon the substance and policy of proposed Regulation 19:46-1.32 within the framework of historical antitrust and trade regulation experience and philosophy. Other serious legal questions and issues will be addressed in a separate commentary filed contemporaneously. We recognize, as a practical matter, that the Commission may well not be dissuaded from its current course absent an authoritative decision of the courts. It would seem, however, to be desirable to avoid the prospect of unsettling litigation of whatever source which would delay the development of Atlantic City's projects and distract the Commission from its primary regulatory mission. While we share and concur in the Commission's desire for proper regulation we believe that the problems presented by the proposed regulation in its current form are substantial and these problems and their existence underline the need for caution in drafting a regulation such as proposed Regulation 19:46-1.32.

I. AIMS OF THE REGULATION. Article 1(12) of the Casino Control Act defines as a portion of the public

policy of the State of New Jersey that "competition *in the casino operations* in Atlantic City is desirable." For that purpose the Commission is empowered to:

> regulate, control and prevent economic concentration in the casino operations and the ancillary industries, and to encourage and preserve competition.

The legislature desired to assure "varied attractions and exceptional facilities" (Art. 1(12))—a normal benefit of free competition among casinos, as it is among movies, broadcasters, publishers and other purveyors of public entertainment. Another and proper concern is the possibility that the undersirable influences, otherwise barred from casino operations, might assert themselves through dominant suppliers upon whom the casino operators would be "dependent".

Unless radically revised, proposed Regulation 19:46-1.32, far from promoting competition and independence, would actually disserve those goals. In fact, proposed Regulation 19:46-1.32 imposes a penalty and a restraint upon free competition.

II. THE SLOT MACHINE INDUSTRY IS NOT MONOPOLIZED: BALLY'S SUCCESS, RESULTING FROM TECHNOLOGICAL AND STYLE INNOVATIONS, EFFICIENCY, SUPERIOR SERVICE, AND EARLY ENTRANCE INTO AN INFANT INDUSTRY IS NOT AN OCCASION FOR GOVERNMENTAL RETALIATION. Nothing is better settled in antitrust law than the proposition that succeeding over one's competitors by normal business means, i.e., offering a better product or service, is not monopolistic. As the famous Jurist Learned Hand observed long ago, competition is a race, and it would be irrational to encourage such a race by antitrust laws and then to condemn the winner. To monopolize means to *exclude* competitors, not to prevail over them. That is, to illegally or improperly obtain or

maintain a high market share is the type of monopolization that is condemned by antitrust and trade regulation laws. Thus, it is the unfair or illegal acts or practices utilized, not the degree of fair market success obtained in an industry that is condemned. This is and always has been at the very heart of the American economic system.

The fact that one firm may do a large part of the business in a segment of an industry signifies absolutely nothing about "monopolizing" unless one takes into account the nature of that particular industry and the market it serves. The Supreme Court of the United States has held that market shares are not determinative. For example, acquisition by one large coal company of another was sustained, despite impressive market shares, where analysis of the market indicated that the acquired company, because of low coal reserves, had little future potential for serving the utility market where 20 year supply commitments were required. *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). So also where state law closely regulated the possibility of expanding in the banking business by branching, the Supreme Court sustained a bank merger despite high concentration figures. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974). There are markets in which a single firm dominance is virtually inevitable, such as where the number of potential buyers is so limited and the required investment so large that the market will not support more than one viable firm. This is the case with so-called "one newspaper towns" which are becoming more and more common in today's economy in this country. It is the case with the Phillips Company (Holland's General Electric Co.) in manufacturing electric lamps in a small country.

Similarly, if a market is one that is declining, supplying firms gradually will go out of business; the last surviving firm will be doing all of the remaining business but it is not, on that account, an illegal monopolist. By the same token, if a *new market* is being created, the first firm into

that new market will naturally find itself alone in the field until others catch up. At the same time, the innovating firm in that market, be it the first or the second entrant, will quickly or inevitably capture the market, and if that innovating firm does not engage in predatory practices, i.e., unfair practices designed to throw obstacles into the path of would-be competitors, the innovating firm violates no standard of law, morals or economics. Such would be the case with Bally Manufacturing Corporation in the slot-machine industry in this country.

Not only is the modern slot machine market a "new" market in which technological innovation can give a commanding lead; but it is important to recognize that this, in part, is a "style" or "fashion" market, where appearance and external design can make one machine much more attractive — hence profitable — than another. Attractiveness is a matter of physical appearance of the machine, ease of operation, and most of all, interesting and novel combinations of play and odds. This is universally recognized in recreational gambling. The State of New Jersey itself has just announced a revision of the state lottery program to increase its attractiveness along these lines. Racetrack betting enhanced its own attractiveness through the use of daily doubles, exactas, and the like. The short history of American casino gambling demonstrates that one machine may be the fashion leader for a few years only to be replaced by a machine manufactured by another firm. This, too, has been a part of Bally's history. For example, Bally's initial effort in the English market failed until it retained a designer who gave its machines a "new look". Its "Gold Award" machine then swept England, and Bally overtook the market leader there. Later still, Bally once again lost a substantial portion of its competitive position in England. Customers in the United States as well at first resisted Bally's entrance into the slot machine field from the pinball field, apprehending a stressing of new models and user appeal. Later customers including

the leading casinos began to see that such user attractiveness was profitable, and Bally's leadership resulted. Bally machines were copied. Bally, like any designer of fashion clothes, could lose this leadership if another supplier could surpass it in user attraction. Similarly, due to the importance of reliability and workmanship of a machine in this industry, another supplier could assume leadership if it could either build a more reliable piece of equipment or provide better service. Where experience shows that leadership can be quickly won and lost, as in the slot machine industry, it is clear that monopoly does not prevail, but instead a vigorous competition. This has been pointed out by economic experts. See Joskow, *Structural Indicia; Rank Shift Analysis,* 42 Rev. Econ. & Stat. 113 (1960). So vulnerable a position can hardly be called monopoly.

It is significant as well as interesting in this regard that the State of New Jersey has not thought to attempt to regulate (nor to our knowledge has any other state or governmental agency) the percentage of computer equipment that can be bought by consumers or state agencies from IBM, the number of copying machines that can be bought from Xerox Corporation, the number of automobiles or trucks that can be bought from General Motors, self-developing cameras from Polaroid, packs of chewing gum from Wrigley, and ad infinitum with other materials. Highly significant also, and more to the point in proposed Regulation 19:46-1.32, is that no service industry other than slot machines has been singled out for attention. No other gambling or gaming devices, crap tables, blackjack tables, dice, playing cards, roulette wheels or baccarat equipment has been the subject of regulation. Yet in all these instances market dominance of supply is prevalent.

III. LOW BARRIERS TO ENTRY IN THE SLOT MACHINE BUSINESS PREVENT MONOPOLY AND UNDESIRABLE "DEPENDENCE." It is characteristic

of true monopoly situations that entry barriers are high. That is to say, those already in the business are somehow protected against newcomers. In international trade such protection is afforded by tariff laws or "quotas" directed at excluding foreign competition. Similarly, patents granted by the government for inventions may for a time exclude would-be competitors. A dominant firm in a true monopoly situation might also sign up most of the customers through exclusive dealing arrangements in order that a newcomer would be hindered in attempting to break into the market. If large investments are required and have already been made by those in the field on a scale sufficient to supply the anticipated market, that too would present a barrier to a new entrant although scarcely an illegal barrier. These conditions do not exist in the truest sense in the slot-machine industry. New manufacturers do have the ability to break into the market, and have in fact broken into the market both in New Jersey and Nevada, witness the recent entry of AES Technology Systems. The large casino operators themselves have the resources and the very incentive to enter the market and pose potential entrants at all times, particularly if they think that they can do a better job than independent suppliers. Witness that Harrah's, one of the largest slot machine users in the United States, has historically supplied itself with its own machines. Witness also the attempt (discussed in further detail later) by Resorts International to acquire Williams Electronics Company. Major foreign suppliers such as Bell Fruit, Sega and Aristocrat, all pose potential entrants at any time into the slot machine industry. The potentiality of entrants is always a deterrent to a monopoly situation. In fact Bell Fruit, the largest manufacturer of slot machines in the world, has already entered the New Jersey market. All of this points out additionally the absence of high barriers to the industry which in turn depicts a non-monopoly industry.

Indeed one of the principal and immediate results of a 50% arbitrary quota might very well be a bonanza for Japanese or possibly other foreign suppliers who might not be as amenable and accessible to the Commission for supervision generally and for restraint on undesirable influences in particular.

IV. CONCENTRATION ON THE BUYER SIDE PRESENTS "COUNTERVAILING POWER" THAT MITIGATES THE DANGERS, IF ANY, OF "DEPENDENCE" UPON LARGE SELLERS. Monopoly means *power* in a market. Where sellers face large firms on the buying side, they are more dependent on the buyers than the buyers are upon the sellers, especially when the large buyers have the alternative of becoming self-suppliers. This type of concentration is found in the casino industry. When a typical casino in New Jersey is, by regulation, able to buy units of approximately 1,700 or 1,800 machines, we are not dealing with small purchasers. Resorts and Ceasar's World have already indicated that they will be and are buying under present plans approximately 1,700 to 1,800 slot machines each. Other large hotel-casino purchases have historically been even larger, such as the MGM with 2,000 machines in Las Vegas, and with similar numbers in Reno, Nevada. Again, evidence that the buyers are large in nature. Additionally, if present planning anticipates in Atlantic City 10 to 15 casinos in maximum, we see further evidence of a not large group of buyers, particularly if any one casino license holder may hold three licenses under current regulations. Thus the buying power for all the slot machines in Atlantic City could well be held by no more than four or five purchasers.

V. THE 50% PROPOSED REGULATION APPEARS TO HAVE ORIGINATED IN A LARGE BUYER'S MANUEVER TO SECURE FOR ITSELF A POSITION AS A PROSPECTIVE MANUFACTURER OF A PROTECTED SHARE OF THE MARKET. Resort's In-

ternational's agreement to purchase no more than 50% of its slot machine requirements from any one manufacturer, followed by its abortive plan to acquire Williams Electronics Company, a producer of slot machines, manifests in and of itself a link to a plan to assure for itself (by law, not by competition) a large share of the slot machine market. Protecting markets by law is the antithesis of competition, as can be seen in the current national "deregulation" program, whereby the federal government is belatedly seeking to re-establish competition by reducing regulation in the trucking and airline industries. It has been learned by federal agencies that arbitrarily allocating customer markets and suppliers eliminates rather than fosters competition and results in injury rather than benefit to the public. Similarly, when nine European countries set out to create a *competitive* "common market", they agreed to *eliminate* both national production "quotas" and sales "quotas", as well as tariffs.

VI. The 50% RULE FOSTERS DUOPOLY, NOT COMPETITION. The salient and direct consequence of the 50% rule is a *restraint on competition*, i.e., the exclusion of Bally from 50% of the market. The indirect consequence of the proposal is to foster a duopoly, i.e., a market largely supplied by two firms rather than one. If we are correct that concentration in the manufacture of slot machines is a natural (and possibly transient) result of technical and style innovations, service, limited markets, and concentration on the buying side, it seems likely that the 50% of the market from which Bally would automatically be excluded would itself gravitate into the hands of one firm that outdistanced others. A two-firm supply situation is very far from being a competitive market in the antitrust sense. Economists tell us that such "oligopolies" function "interdependently", i.e., with an acute awareness of each other's probable responses to commercial moves. As a consequence, they do not initiate price

wars or radical technological innovations. A common rule of thumb recognized historically in industrial organization is that oligopoly prevails wherever *four firms* control 50% or *eight firms* control 75% of the relevant trade. Any progressive tendencies in a duopoly would result then not from their rivalry, but from the potential competition of the large casinos and the outside competition of foreign suppliers and smaller domestic firms. These influences, however, are already in operation and in effect in the present market. As the Supreme Court said in *United States v. National Lead Co.*, 332 U.S. 319, 352 (1947), in turning down a request for divestiture even after a finding of antitrust conspiracy among three industrial giants: "There is no showing that four major competing units would be preferable to two. . ."

VII. THE 50% RULE RUNS COUNTER TO THE COMMISSION'S BASIC OBJECTIVES. As we have pointed out, a 50% limitation *would not promote competition* but, on the contrary, would restrain Bally, as well as any other market leader, from competing and would tend to create a non-competitive, oligopolistic, 50/50 legalized division of markets. There would be no incentive for Bally, limited as it were to a legal maximum of 50% sales, to continue to improve and diversify its product or to create or innovate new features for Atlantic City casinos and patrons. Correspondingly, there would be substantially less incentive for other suppliers to engage in progressive developments to enhance their product. Design, manufacture and distribution economies would be disregarded by remaining suppliers, resulting in purchasers being subjected to increased costs and reduced profits. In turn, state revenues would be adversely diminished. Benefits to be derived from open competition would be disregarded for the arbitrary allocation of 50% of the market.

VIII. ADMINISTRATIVE BURDENS. ADVANTAGES OF FREE COMPETITION OVER A MARKET-ALLOCATING RULE. The legislature has wisely given the Commission discretion to pursue its goals by regulatory oversight or by promoting competition, or by some combination of the two. We would suggest that Regulation 19:46-1.32 should be designed to encourage healthy, competitive practice rather than to lean so heavily on a market-allocating rule that entails continuing supervision and litigation of issues such as "adequacy", "availability", "reasonable terms", and "good faith". Competition and government regulation are simply two ways of controlling an industry. See Schwartz and Flynn, Antitrust and Regulatory Alternatives: Free Enterprise and Economic Organization (Foundation Press, 1977), p.xv. Even where regulation has been authorized, the United States Supreme Court (as well as state courts) has interpreted the regulatory statutes to favor competitive solutions and the "less restrictive alternative."[1]

Especially adverse to the public interest would be any provision making "adequate" slot machines the standard for purchasing. *See* Paragraph (b) of Proposed Rule 19:46-1.32. In the light of what has already been said above about the competition prevailing in the industry to supply the most attractive machines, any compulsion by law to merely "adequate" machines would certainly invoke criticism from the casinos, the press, the public and the legislature. The Supreme Court of the United States has recently served notice that regulation is not to divert trade to merely adequate channels. *See National Citizens Commission v. Federal Communications Commission*, 436 U.S. 775 (1978) (overruling the Court of

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[1] See Struve, The Less-Restrictive Alternative Principle and Economic Due Process, 80 Harv. L. Rev. 1463 (1967); Federal Maritime Commission v. Swedish American Lines, 390 U.S. 238 (1968).

Appeals decision that the FCC must break up newspaper-broadcaster affiliations if independent operation by the broadcast licensee would be "adequate"). Compare *Schaffer Transportation Company v. United States*, 355 U.S. 83 (1957) ("adequacy" of rail service no bar to licensing new motor service).

From an administrative point of view, free competition offers many advantages. It allows the market itself, i.e., the buyers, to select the most qualified suppliers and to choose between sole-source supply and multiple-source supply. It frees the limited personnel and resources of the regulatory agency for tasks where direct government intervention is essential. Most of all, it avoids public suspicion of official bias and favoritism, a constant and overriding concern in highly controversial fields. If for no other reason than to maintain maximum public confidence, it would seem that the Casino Control Commission would want to rely on market controls rather than on regulatory intervention, whenever possible.

It is, after all, the unfair competitive *practices* that should be scrutinized by a regulatory agency such as the Commission. It is the supplier that takes unfair advantage of competitors or of buyers who should be sanctioned and condemned by this Commission or any other regulatory body. It is the anti-competitive *actions* of suppliers that should be protected against by a proposed regulation of this Commission. Predatory conduct by a supplier such as favoritism to one purchaser or discrimination against another, forcing of unwanted products upon a purchaser in order to obtain desired products and exclusive dealing arrangements, historically has been condemned by courts and regulatory agencies. All of these are and should be the legitimate concern of this Commission and therefore the desired objective of proposed regulation. None of these practices are breached by proposed Rule 19:46-1.32 nor are they even contemplated. But it is in fact here that the

Commission should focus its attention rather than attempting, by governmental fiat, to arbitrarily interfere with the natural competitive forces in the slot-machine industry.

IX. DESIRABLE AMENDMENTS AND CLARIFICATIONS OF PROPOSED REGULATION 19:46-1.32.

A. Exempt Self-Supply. The regulation should certainly be inapplicable, if it is enacted in present form, to a casino's use of machines *of its own manufacture.* It is unrealistic and anti-efficient and, in fact, an unwarranted punishment to expect an operator to go outside for equipment which it can supply from its own internal sources. Moreover, if the Commission wishes to encourage new entry into the business of manufacturing slot machines, self-supplying casinos are a most likely entrant. Such entrants need not be confined to self-supply. Self-supply situations are totally free from suspicion of casino "dependence" on unsavory outside influences. Self-supplying casinos would be likely to develop diversified machines. Exemption of self-supply should be reasonably defined to include supply by subsidiaries and affiliates as well. In this connection it should be borne in mind that it makes no difference for the Commission's purposes whether a casino has a wholly-owned manufacturing subsidiary or a manufacturer has a wholly-owned subsidiary casino. Substance, not form, should govern. It is practical identity of the enterprise rather than corporate structure that should be the determinant.

B. Exempt Second-Hand Machines and Other Machines Not Acquired from the Manufacturer, and All Machines Over One Year Old. The proposed regulation speaks of "machines . . . manufactured by any one manufacturer [or affiliates]." We believe the Commission's staff could not have intended to cover second-hand or obsolete

machines, but this should be made explicit if the regulation goes forward in its present form. Such machines are not acquired from the manufacturer, and in fact constitute an important source of competition in the after-market against the original manufacturer. Dependence upon the original manufacturer is not enhanced but rather is diminished insofar as the casino operator has available to it or relies upon a second-hand market. In this connection it is widely recognized that the second-hand, rebuilt or after-market is an integral part of the competition in the slot-machine industry.

C. Exempt Small Buyers. Any regulation requiring multiple sourcing should not be applicable to operators using less than a certain amount of machines. It would almost be prohibitively costly for smaller operators to have more than one supplier's line. They should be free to do so if they wish, but it would be a hardship on them to require it, since this would necessitate repair expertise and spare parts for diverse equipment. Moreover, the Commission would not wish to impose on smaller operators the substantial drain on time and money involved in "a good faith effort to seek out" second-source machines "available under reasonable terms".

D. Clarify Terminology. The multiple sourcing approach set forth in the proposed regulation creates a number of ambiguities which will make it only more difficult for operators and suppliers to live with and for the Commission to administer and is an open invitation to court litigation. For example, the "sufficient number . . . available" does not make it clear whether there will be assurance of *future* supply from the same source in volume proportionate to anticipated operation. The fact that at a given moment a few machines are available from a "fly-by-night" source or marginal supplier ought not give rise to an obligation on the part of the purchaser to buy those

machines. Unless steps are taken to avoid the imposition of such an obligation, we may be sure that there will be such fly-by-night sources and that they, in turn, will create an additional amount of chaos in the market place. The ambiguity is aggravated by the need to take into account prospective availability of replacement parts and service.

Paragraph (b) of 19:46-1.32 is gravely ambiguous in making the standard of behavior depend on the availability of "adequate" slot machines. "Adequate" is far different from "equally good". Surely the Commission would not want to mandate the purchase of barely adequate machines. At the very least, Paragraph (b) should be revised to refer not to "adequate" machines but to "machines of the quality, style and class sought by the purchaser."

E. Expediting Procedures. Experience shows that there will be need for exceptions to any 50% or multiple-sourcing regulation. Recognizing this, proposed Regulation 19:46-1.32 does provide for application for modification. It is strongly urged, however, that this *application* procedure be converted into a *notification* procedure, along the following lines:

> Any casino "having made a good faith effort, etc." may, without application to the Commission, acquire machines in excess of the quota to fill its needs, supply a reserve against contingencies, take advantage of unusual purchase opportunities, or otherwise act in the course of normal business operations. The circumstances or any such transaction shall be reported to the Commission within ..... days after the acquisition, and shall be subject to review by the Commission. If the Commission finds that the transaction was in violation of the good faith requirement, it may order the quantities of over-purchase charged against future quotas of permissible purchases by the operator from that same supplier.

This type of procedure would free the Commission as well as the operators from much unnecessary paper work and

involvement in regulatory proceedings, while still preserving full control by the Commission over the subject. It would also tend to eliminate the intimidating effect upon the operators who, subject as they are to their own licensing, and occupied as they will be with their own operational problems and requirements, would be less likely to want to create more burdens for themselves and the Commission if they are required in advance to seek and justify permission for any exempt purchase.

X. ALTERNATIVE APPROACH. A regulation prohibiting certain anticompetitive acts would eliminate the likelihood of unfair advantage. This would promote the objective of the Commission by focusing on specific practices without artifically interfering with free competition.

A suggested example could be as follows:

(A) Any person holding a casino service industry license pursuant to Section 92(a) and (b) of the Act shall be prohibited from:

(1) Refusing to furnish or willfully delaying the furnishing of, on customary and reasonable terms, its products or services to a Purchaser (referred to as "Purchaser" or "Purchasers" in this Regulation), if the intent and effect thereof would be to thereby provide a competitive advantage to an affiliate of such casino service industry licensee;

(2) Making sales to any Purchaser on anything other than normal credit terms (consistent customary business practices applicable to the specific product or service line);

(3) Engaging in any discriminatory practice relating to the prices charged or terms granted to different New Jersey casino licensee Purchasers for products or services of like grade or quality where the effect of such discrimination is to substantially lessen competition or to create a monopoly or to injure, destroy or prevent competition; provided

that nothing herein contained shall (i) prevent differences in the prices charged or terms granted to Purchasers which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities or services are to such Purchasers sold or delivered, or (ii) prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of goods concerned, or (iii) prevent a seller from granting a lower price or furnishing services or facilities to any Purchaser or Purchasers where made in good faith to meet an equally low price of a competitor or the services or facilities granted by a competitor;

(4) The tying of the sale of one product or service to a Purchaser to the purchase of another product or service by such Purchaser, where the effect of such sale is to substantially lessen competition or to tend to create a monopoly;

(5) Conditioning the sale of products or the providing of service upon a promise, express or implied, by a Purchaser to refrain from purchasing a competing product or service from a competitor or competitors of the seller where the effect of such sale or promise is to substantially lessen or to tend to create a monopoly.

(B) Any person holding a Casino License pursuant to Section 82 of the Act shall be prohibited from knowingly inducing or receiving a discriminatory price or term from any person in the Gaming Equipment Industry (as defined in N.J.A.C. 19:43-1) not made available on a proportionately equal basis to other competing Purchasers.

CONCLUSION

The importance of the Commission's actions with respect to Proposed Rule 19:46-1.32 and the frontier character of this action by the Commission dictates that every reasonable avenue be pursued to avoid an arbitrary stifling of free competition in a rapidly expanding and rapidly changing industry.

Respectfully submitted,

BENESCH, FRIEDLANDER,
COPLAN & ARONOFF

By /s/ ROBERT A. GOODMAN
Robert A. Goodman

ROBERT A. GOODMAN, ESQ.
Of Counsel and on the Brief

PROFESSOR LOUIS B. SCHWARTZ, ESQ.
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
Of Counsel and on the Brief

GOLDEN NUGGET
Gambling Hall and Rooming House
Fremont at Casino Center

Stephen A. Wynn
President

RECEIVED
Oct. 2, 1978
Casino Control
Commission

September 25, 1978

Mr. Joseph Lordi
Casino Control Commission
379 W. State Street
Trenton, New Jersey 08526

Dear Mr. Chairman:

Although our application will be forthcoming in the next thirty (30) days, at which time our company and the commission will begin a dialogue concerning many areas of casino activities, I have taken the liberty of preparing a brief comparative summary of the major slot machine products on the market. My remarks, which are not altogether general in nature, may well be the first that you have received concerning the relative merits of these various products. I hope you will review my observations and take whatever steps you think necessary to verify them.

The point of my rather early approach to you on this subject is to prepare you for what will be my subsequent request that the Golden Nugget not be required to purchase equipment which we feel is inferior. I understand your need under the statute to foster competition in all areas of casino activity. However, I believe upon further investigation you will find it to be rather difficult for the

State of New Jersey to help slot machine manufacturers who heretofore have not been able to help themselves.

Notwithstanding my own opinion on these matters, here are some observations which may be of interest to you.

Respectfully,

/s/ STEPHEN A. WYNN

Stephen A. Wynn,
President

SAW: j/
encs.

JENNINGS MACHINES

Since its heyday in the early 1960's, this company has been on a steady decline. For the past five (5) years, Jennings has tried to introduce its electronic machines, but has suffered setbacks each time. Originally, they opted for electronic tape on its reels (to read and index symbols) but the system didn't work. The machine then incorporated a single, large circuit board but chip failures and down-time increased, because isolating the individual problem required constant probes. Also, casinos have complained about the poor handle mechanism and the lack of player appeal. There are approximately one-thousand (1,000) Jennings machines in use today and less than two hundred (200) locations in the Las Vegas area, mainly at the Sahara Hotel but their earnings are poorest among the various types used. Jennings also has a poor mix of models (mainly 3 reel) and a lengthy delivery time. Upon observation of these machines it is obvious to see there is no comparison in their dollar and twenty-five cent machines to Bally machines. The Jennings machines would require a thorough training of mechanics, for the majority of mechanics today are Bally orientated. In the Las Vegas area, Jennings has no distributorship and no service department, other than in the Reno area. The only advantage to a Jennings machine would be their slimmer line and lower price.

SEEBURG MACHINES

Despite its many difficulties (poor financial state, lack of distributors, poor delivery record) Seeburg refuses to die. As well, they suffer from a major problem in providing parts to customers. Internally, the machine has problems: stepping off a dead contact on multiple pays (11 steps on 10 pays) which often goes wrong; fragility in the copper wipers, easily strung or rythym played, useless inner door

that makes repairs more difficult; poor reel strips and pay frequencies. Bally Distributing doesn't like to take them in on trade-ins. There is no advantage to purchasing Seeburg machines except for its low price.

STANDARD BALLY MACHINES

Bally Manufacturing has many models to choose from and will manufacture new models upon request and to your specifications. Although the Bally machine comes equipped with anti-cheat devices they will incorporate any anti-device or special artwork on an initial order at no additional cost. Financing of Bally machines is easily obtained and in many cases they have their own financing, even allowing you to pay for the machines at 25% of the drop or over a six (6) month period at no interest. Bally is largely responsible for the *Dollar Boom* that has hit the industry, which in many cases, accounts up to 49% of the slot earnings. Wide reel machines have no competition on the market, they also manufacture a low-boy model which is advantageous for its low profile, insuring better coverage for change personnel, maintenance personnel and security personnel.

BALLY CLASSIC MACHINES

The Bally Classic machines are a compact and attractive unit that will certainly be more and more successful because of its size. Also, it is built in segments, making every part of the machine easily removable and accessible for servicing. Its track record is still not known, having been in action only since May 1978. Definitely a machine to watch.

CONCORD MACHINE

The Concord machine is a new slot machine that is presently being manufactured in the Las Vegas area and

will have its first showing in January 1979 at the London show. The Concord machine may well be the ultimate leader in its field. The Bally machine, successful as it is, has over two hundred (200) mechanical parts, the Concord will have less than thirty (30), it has the mechanical handle pull that has made Bally so popular. They have successfully married electronics and mechanics together for the first time. Up to this date ten (10) prototypes are being built and the manufacturing date is set for the summer of 1979, this machine will be equipped with all the latest anti-cheat devices and the capability of going on-line to a computer at no additional cost or modifications. All machines are equipped with wide reel features that give the Bally Dollar machines so much player appeal, yet the machine takes up less space than a standard Bally machine. The same cabinet used for a three (3) reeler can be used for a four (4) reel machine. This machine will be manufactured with all the requirements of the New Jersey Gaming Control Board. Certainly a machine to consider in the near future.

December 4, 1978

Mr. Michael Santaniello
Casino Control Commission
379 W. State St.
Trenton, New Jersey 08625

Re: Bally Slot Machine Purchase

Dear Mr. Santaniello:

I had, as you know, written to you two weeks ago with respect to the above referenced matter. Pursuant to your instructions in our meeting of last week, I am corresponding with regard to this matter to clarify our position.

The current regulations do not prohibit the purchase of all slots from one manufacturer. Notwithstanding the absence of regulation, our decision is dictated solely by our operating experience and history with respect to the reliability of slot machines made by manufacturers in the industry.

There have, in fact, been few technological advances in the history of the slot machine. Bally has always proven, through continual upgrading of their lines, (as a result of contact with the industry) techincal research development and leadership to have developed machines with the greatest reliability factor. We have in fact utilized other machines and our casino in Las Vegas is continually kept aware of advances in the state of the art by manufacturers trying to sell their wares to us. They advise, that there still does not exist a machine (mechanical, electromechanical or solid state) of equal or superior quality and reliability to the Bally machines.

I implore you to not penalize us or the New Jersey customer by wishing to choose the best available machines

Mr. Michael Santaniello December 4, 1978

on the market. I am sure that I need not recount to you the operating expertise of Caesars Palace. You, are aware of that educated expertise which has as its very core and adjunct the desire to give its customers the best of service and entertainment. We do not feel we can provide this on a consistent basis with other manufacturers' products and respectfully urge a swift and expeditious decision of this matter.

If you require any information or have need to discuss this matter further please contact my office at your earliest convenience.

Very truly yours,

MARK A. GELLER
Vice President
Caesars New Jersey, Inc.
for Desert Palace of New Jersey, Inc.

MAG/m

December 15, 1978

Michael A. Santaniello, Esq.
Senior Assistant Counsel
Casino Control Commission
329 West State Street
Trenton, New Jersey 08625

Dear Mr. Santaniello:

I am enclosing a recommended regulation in the area of control of competition with respect to gaming devices for your consideration.

This will also confirm our meeting for Tuesday, December 19, 1978 at 10:00 a.m. at your office, in Trenton.

Very truly yours,

CLIVE S. CUMMIS

CSC:dlg
Enclosure

CASINO CONTROL COMMISSION

Regulations Relating to Casino Service Industries

Proposed Amendment Revising N.J.A.C. 19:43-6

"Competition"

New Jersey Administrative Code

Title 19 — Other Agencies

Subtitle K — Casino Control Commission

Chapter 43 — Casino Service Industries

COMPETITION

19:43-6

[(a)] The Commission and the Division shall have the power and the duty to regulate, control and prevent economic concentration in casino operations and in casino service industries so as to encourage and preserve competition.

[(b)] Any person holding a casino service industry license pursuant to Section 92(a) and (b) of the Act shall be prohibited from:

1. Engaging in any discrimination in the prices charged or terms granted to different New Jersey casino licensee purchasers (referred to as "Purchaser" or "Purchasers" in this Regulation) for products or services of like grade or quality where the effect of such discrimination is substantially to lessen competition or to create a monopoly or destroy or prevent competition; provided, that nothing herein contained shall (i) prevent differences in the prices charged or terms granted to Purchasers which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities or services are sold or delivered to such Purchasers, or (ii) prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of goods or services is concerned, or (iii) prevent the granting of a lower price for a product or for the furnishing of services or facilities to any Purchaser or Purchasers where made in good faith to meet an equally low price of a competitor;
2. Refusing to sell one product or service to a Purchaser unless the Purchaser also agrees to purchase another product or service by such Purchaser, where the effect of such sale is to substantially lessen competition or to create a monopoly;

3. Conditioning the sale of products or the providing of service upon a promise, express or implied, by a Purchaser to refrain from purchasing a competing product or service from a competitor or competitors of the seller where the effect of such sale or promise is to lessen substantially competition or to create a monopoly;

4. Making sales to any Purchaser on other than normal credit terms (consistent with the usual and customary business practices applicable to the specific product or service line), provided that nothing herein shall be construed to regulate the extension of credit among affiliated companies;

5. Supplying products or services to any Purchaser on terms which discriminate in favor of any Purchaser holding more than one casino license where the advantage results from the combined purchasing requirements of the Purchaser;

6. Willfully failing to furnish, or willfully delaying the seasonable delivery of its products or services to a Purchaser, with the intended effect of providing a discriminatory advantage to an affiliate of such holder of a casino service industry license.

[(c)] Any person holding a casino license pursuant to Section 82 of the Act shall be prohibited from knowingly inducing or receiving a discriminatory price or term from any person holding a casino service industry license which is prohibited by this regulation.

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Office-Supreme Court, U.S.
FILED
AUG 7 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-2202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BALLY MANUFACTURING CORPORATION,
a Delaware corporation,
Appellant,

vs.

NEW JERSEY CASINO CONTROL COMMISSION,
Appellee.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS

ROBERT J. GENATT
Casino Control Commission
Princeton Pike Office Park
Building No. 5, CN-208
Trenton, New Jersey 08625
(609) 292-6845
Counsel for Appellee

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

Questions Presented

1. Assuming for purposes of this motion to dismiss that the limitation imposed by Appellee New Jersey Casino Control Commission through the so-called 50% regulation would conflict with the Sherman Act, 15 U.S.C. §1, if such limitation resulted from purely private concerted activity, is there a substantial federal question presented as to whether the regulation qualifies for the state action exemption of *Parker* v. *Brown*, 317 U.S. 341 (1943) or otherwise qualifies for exemption from the Sherman Act:

(a) where the Casino Control Act, N.J.S.A. 5:12-1 *et seq.*, as authoritatively construed by the New Jersey Supreme Court, not only authorizes but mandates the Appellee to regulate, control and prevent economic concentration in casino operations and the industries which provide essential goods and services to the casinos;

(b) where the Casino Control Act vests the Appellee, a state agency, with exhaustive and exclusive authority to strictly regulate and control the New Jersey casino industry and the industries which provide goods and services to the industry in order to achieve the law enforcement, social and economic policies of the Act;

(c) where the Casino Control Act expressly enjoins the Appellee to adopt regulations governing the manufacture, distribution, sale and servicing of gaming equipment, including slot machines; and

(d) where the products subject to regulation, slot machines, have been removed by Congress from the protection of the Commerce Clause and have been declared contraband under New Jersey penal laws, unless utilized in legalized casino gaming in accordance with the Act and the regulations of the Commission?

2. Does the selection of a mathematical figure and the placement of such figure at 50% in the challenged regulation by Appellee, the state agency with responsibility to prevent harmful economic concentration in the casino gaming industry and with expertise regarding the needs and problems of this developing industry, raise a substantial federal question based on the doctrine of substantive due process?

3. Is a substantial federal question under the Due Process Clause (or an important federal question which has not been but should be decided by this Court) presented by the Appellee's adoption of the challenged regulation, a rule of general applicability and prospective effect, in accordance with the rule-making provisions of the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.*, where the quasi-legislative action was based on indisputable findings regarding the economic concentration in the slot machine market and the importance of slot machines to the viability of casino gaming in New Jersey?

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NO. 80-2202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BALLY MANUFACTURING CORPORATION,
a Delaware corporation,

Appellant,

vs.

NEW JERSEY CASINO CONTROL COMMISSION,

Appellee.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS

Appellee, the New Jersey Casino Control Commission, respectfully moves the Court to dismiss the instant appeal on the ground that the asserted federal questions raised by Appellant are manifestly insubstantial. Further, as to the matters described in the third question, Appellee moves to dismiss on the additional ground that such issues are not within the appellate jurisdiction of this Court under 28 U.S.C. §1257(2). In the alternative, Appellee requests

that the matters described in the third question be deemed a petition for certiorari and that such petition be denied on the grounds that such matters, as resolved by the New Jersey Supreme Court, neither present an important federal question which has not been, but should be, settled by this Court nor conflict with any applicable decisions of this Court.

Statement of the Case

At its public meeting of December 20, 1978, the Appellee approved for publication a proposed regulation concerning slot machines. The proposal provided that no more than 50% of a casino's slot machines could be manufactured by any one manufacturer. An exception to this limitation was provided for in cases where a casino had made a good faith effort to obtain slot machines from more than one manufacturer, but there was an insufficient supply of adequate machines to permit compliance with the limitation. (B.A. 36 to 38).[1] As required by the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.*, the proposal was published in the February 8, 1979, issue of the New Jersey Register, 11 N.J.R. 108, and the Appellee subsequently received and reviewed written submissions filed by numerous interested parties.

The proposed regulation was prompted by two factors. First, the Appellee's experience up to December 20, 1978, revealed that slot machines accounted for a substantial amount of a casino's business. Counsel for the Appellee noted during the December 20, 1978, meeting that:

> [t]he slot machine industry, of course, is of primary concern to casinos since slot machines account for

[1] The notation "B.A." refers to the appendix to Appellant Bally's jurisdictional statement.

> a significant portion of the gaming revenue derived by casinos and approximately counts right now for approximately [sic] 40 to 50 percent of that revenue. (B.A. 37).

The second factor was that there appeared to be economic concentration in the domestic slot machine market and the potential for this economic concentration extending to the Atlantic City market. (B.A. 37).

Appellee's experience in these respects was confirmed in written submissions filed with the Appellee. For example, in October 1978, Paine Webber Mitchell Hutchins, Inc., (Paine Webber) issued a report on Appellant. This report, which was provided to the Appellee, noted that Appellant is "the world's leading slot machine manufacturer" and "has an estimated 80% share of the U.S. market." (C.A. 4).[2] The report went on to "estimate that, unitwise, Bally will account for about 80% of all slots sold in the U.S. in 1978 and about 90% based on dollar value." (C.A. 7). It concluded by predicting that "BLY's [Bally's] 80% market share and product leadership assures them of the bulk of all slot machine sales for at least the next several years." (C.A. 15). Moreover, during the June 20, 1979, public hearing on the adoption of the proposed regulation, Appellant's counsel acknowledged its market dominance in the following colloquy with Chairman Lordi:

> Chairman Lordi: I didn't say a monopoly. I said that statements have been made to the effect that they [Bally] do indeed sell 80 to 85 percent of the slot machines that are—

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[2] This notation refers to the appendix to the instant brief. Only the pertinent pages of referenced reports are included in the appendix to avoid needless duplication of irrelevant material.

> [Appellant's Counsel]: That I am not quarreling with. (B.A. 94).

Appellant has also acknowledged that it lacks effective competition in the domestic slot machine market. In a report filed with the Securities and Exchange Commission and submitted to the Appellee, Appellant observed that:

> Several manufacturers of slot machines in England are significant competitors of the Company in the United Kingdom and two manufacturers in Australia are significant competitors in that market. Although no industry statistics are available, the Company does not believe that it has significant competition in the sale of slot machines in the United States or in any other country (other than those mentioned above) where it markets slot machines, although there are a number of companies throughout the world that manufacture slot machines. (C.A. 1).[3]

Similarly, the Paine Webber report noted the absence of effective competition in the slot machine industry and the serious difficulties which would be faced by a firm entering the field:

> . . . other than Bally and possibly the small privately owned Nevada-based Jennings Corp., no one has made a successful penetration of the slot machine market. While we believe it is financially possible to enter the slot machine market (our estimate is that it would take about a $15 to $25 million investment), we believe anyone new starting to sell slots today would have to wait at least

[3] The referenced report is the Form 10-K for the fiscal year ended December 31, 1977, filed by Appellant with the Securities and Exchange Commission.

three years before they begin to get a return on their investment. We arrive at this conclusion based on the belief that the cost of a slot machine, in determining whether it can be marketed effectively, is secondary in importance to its reliability and popularity with slot players; for the slot machines that make the most money are in high volume locations where they are set to pay back to the player often as high as 97% of what players put in them. Hence, at locations such as these, downtime and lack of popularity are what a casino operator can least afford if he wishes to stay in business. Thus, if a casino operator can be persuaded to install new untested slots in his casino, most likely it will be relegated to a low volume, out-of-the-way location. At this type of location, it will get the same amount of play in six months to a year that slots located in the prime high traffic locations get in a week to a month. Therefore, the quantity tested and accumulated experience on a slot machine from a new manufacturer will not be sufficient, we believe, until the casino operator has had a limited number of functional machines for approximately three years. It is our contention that this long lead time needed before initial payback will discourage most potential competitors from entering the slot machine market. (C.A. 7-8).

In addition to recognizing Appellant's dominant role in the slot machine market, the reports submitted to the Appellee strongly demonstrated the importance of slot machines to casino operations. The Paine Webber report observed that "[t]he slot machine is the cornerstone of almost every casino's product mix," (C.A. 4)

and noted that "[w]ithout slot machines, it is questionable how many of Nevada's 'successful' casinos could remain profitably in business." (C.A. 6-7). Appellant's own 1977 Annual Report agrees with these observations and states:

> The importance of slot machines to the gaming industry is evidenced by the fact that revenues from slot machines accounted for approximately 38% of gross gaming revenues in Nevada in 1977. (C.A. 17).

In this respect, the Paine Webber report points out that as the casino industry expands, slot machines are likely to play an even greater role because they are easy to manage.

> Probably the scarcest commodity in the casino industry is skilled managerial talent. Since slot machines make fewer demands on managerial time, it is reasonable to expect that if there are a larger number of new casinos, slot machines will play even a more prominent part in these casinos than they have until now. (C.A. 11-12).

Appellee considered the proposed regulation during its public meeting of June 20, 1979. After hearing oral presentations by interested parties, including Appellant's counsel and antitrust expert, the Appellee voted to adopt the regulation. (B.A. 55 to 106). The regulation was filed with the New Jersey Secretary of State on June 28, 1979, and is codified in the New Jersey Administrative Code as N.J.A.C. 19:46-1.32. It reads in full:

> (a) Unless otherwise approved by the Commission, no more than 50% of the slot machines used in any casino in this State to conduct gaming shall

have been manufactured by any one manufacturer or by an enterprise under the direct or indirect control of said manufacturer.

(b) The Commission may modify the said limitation of subsection (a) of this section upon a finding that the casino licensee or applicant for a casino license has made a good faith effort to seek out and obtain slot machines from more than the single manufacturer and that a number of adequate slot machines sufficient to comply with the said limitation are not reasonably available for such use in the said casino.

(c) A casino licensee or an applicant for a casino license may seek modification of the limitation of subsection (a) of this section by filing a verified petition with the Commission alleging sufficient facts to satisfy the standards set forth in subsection (b) of this section.

(d) In response to such a verified petition, the Commission may decide the request summarily, elicit further information from the petitioner or other interested persons, set the matter down for a hearing or adopt such other procedure as may be appropriate under the circumstances.

At the time the regulation was adopted, Resorts International Hotel, Inc., the first casino to begin operations, had agreed voluntarily to purchase no more than 50% of its slot machines from one manufacture. However, it was later discovered that this was not feasible and Resorts International Hotel, Inc., eventually purchased far more than 50% of its slot machines from Appellant. (B.A. 49). At the time the regulation was being considered, Boardwalk Regency Corporation (Caesar's), the second casino

to begin operations, had indicated that it intended to purchase all of its slot machines from Appellant (B.A. 42 and 43), but did not do so in view of the regulation. Bally's Park Place, Inc., which is owned by Appellant, was the third casino to commence operations. On May 21, 1979, Appellee ruled that the then proposed regulation did not apply to a casino's purchase of slot machines from a manufacturer which owns the casino. Thus Bally's Park Place, Inc., is free to purchase all of its slot machines from Bally.[4]

On August 10, 1979, Appellant filed an appeal from Appellee's action to the Appellate Division of the New Jersey Superior Court. While the matter was pending before the Appellate Division, Appellant moved to have the case certified directly to the New Jersey Supreme Court, and the motion was granted. *See* N.J.Ct. R. 2:12-2. On March 17, 1981, the New Jersey Supreme Court rendered its written decision affirming the validity of the challenged regulation and approving the procedures followed by Appellee in adopting it.

Summary of Argument

1. The challenged regulation was promulgated by Appellee, the state agency vested with exclusive authority over casino gaming in New Jersey, pursuant to the comprehensive powers vested in Appellee by the Casino Control Act and pursuant to a specific mandate to regulate, prevent and control potentially harmful economic concentration in the industries which provide goods and services to casinos. The New Jersey Supreme Court, recognizing

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[4] At the time of the state court appeal, Appellee's records reflected that approximately 72% of the slot machines in use in Atlantic City casinos were manufactured by Appellant.

the extraordinary sensitivity of the gaming industry and the Legislature's express intent to exert the strictest possible control over both casinos and their suppliers, properly and authoritatively construed the Casino Control Act as empowering and requiring the Appellee to prevent economic concentration, no matter how obtained, in the vital slot machine market. The Appellee's response to the problem of slot machine market domination was necessary to avoid the threat posed to the state policies of the Casino Control Act, namely, the stability of casino gaming and the integrity of the regulatory process. Moreover, Appellee continuously monitors and supervises importation, sale, service and use of slot machines related to Atlantic City casino operations. Thus, adoption of the challenged regulation and any restraint which it may impose on competition in the Atlantic City slot machine market easily meet both prongs of the test for antitrust immunity of state action as articulated in *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Alum.*, 445 U.S. 97 (1980).

2. The determination to impose a percentage limitation on the amount of slot machines supplied to a casino by a single manufacturer and to set that percentage at 50%, subject to an exception where adequate machines cannot be obtained from alternate sources, was made by Appellee in the exercise of the quasi-legislative authority vested in it by the Casino Control Act. These determinations were within the expertise of the Appellee based upon information about the slot machine industry, the slot machine market in Atlantic City and the expected growth rate of the casino industry. Percentage limitations are appropriate since the very fact of a grossly imbalanced slot machine market threatens the central policies of the Act. The 50% limitation was chosen with the dual purpose of reducing the imbalance to a tolerable level and of providing an in-

centive for manufacturers to enter the market. Since the regulation is subject to review on the narrow grounds of arbitrariness or capriciousness and since the regulation must be sustained if any reasonable set of facts can be conceived to support it and since Appellant has utterly failed to carry its burden of rebutting the presumption of reasonableness, the regulation is not susceptible to serious attack on the basis of substantive due process.

3. In adopting the challenged regulation, the Appellee complied with the rule-making requirements of the New Jersey Administrative Procedure Act. N.J.S.A. 52:14B-1 *et seq.* The proposed regulation was published in the New Jersey Register and comments from interested persons were solicited. Appellant submitted a detailed submission on the proposal which was reviewed by the Appellee and its staff prior to the June 20, 1980, public meeting when the proposed regulation was adopted. (See B.A. 110 to 127). Appellant's counsel and expert was permitted to address the Appellee at the June 20 meeting and restated Appellant's position. (See B.A. 82 to 100). Since the Appellee was considering a rule of general applicability and prospective affect, since the underlying reasons for the rule were matters of policy, general information and law, and since the essential findings in support of the rule were beyond dispute, the procedures followed by Appellee in adopting the rule were fully adequate, fair and proper under established principles of due process.

ARGUMENT

POINT I

Promulgation of the challenged regulation constituted State action in accordance with clearly articulated and affirmatively expressed State policy and any restraint on competition under the regulation is immune from attack under the antitrust laws.

Appellant asserts that the challenged regulation, N.J. A.C. 19:46-1.32, results in a restraint of trade proscribed by the Sherman Act, 15 U.S.C. §1. While it may be argued that the effect of the regulation is actually to encourage competition in the Atlantic City slot machine market,[5] it is unnecessary to do so. It may be assumed for purposes of the instant motion that the restriction imposed by the regulation, that is, a limitation of 50% on the number of slot machines from any one manufacturer in use in any particular casino, would be violative of the Sherman Act if undertaken by agreement among private parties. Nevertheless, the regulation is not subject to challenge on this ground since it clearly falls within the so-called state action exception of *Parker* v. *Brown*, 317 U.S. 341 (1943), as that exception has been refined by subsequent decisions of this Court.

Before addressing the state action issue, it is important to observe that the regulation in question was promulgated by the state agency exclusively entrusted to oversee the casino industry in New Jersey, an industry which was previously illegal in New Jersey and which required approval of a constitutional referendum by the citizenry. N.J.

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[5] The New Jersey Supreme Court so noted without reaching the question. (B.A. 13 n.5).

Const. (1947), Art. 4, §7, par. 2. Casino gaming is plainly a subject of the utmost concern and interest to the State of New Jersey and its people. The Casino Control Act (the Act) mirrors that concern and vests the Appellee with extraordinary power and authority rarely, if ever, found even in other highly regulated industries.

In particular, the Act declares that casino gaming can succeed only if public confidence and trust in the industry and the regulatory process are maintained and, to that end, "the regulatory provisions . . . are designed to extend strict State regulation to all persons, locations, practices and associations related to the operation of licensed casino enterprises and *all related service industries as herein provided.*" N.J.S.A. 5:12-1(b)(6). (emphasis added). Gaming equipment manufacturers, such as Appellant, must obtain licensure under stringent qualification criteria, N.J.S.A. 5:12-12 and -92; and the Appellee is commanded to prescribe regulations governing "the manufacture, distribution, sale and servicing of gaming devices and equipment." N.J.S.A. 5:12-70(i). In addition to the myriad authorizations and powers granted to Appellee throughout the Act, N.J.S.A. 5:12-75 provides:

> The commission may exercise any proper power or authority necessary to perform the duties assigned to it by law, and no specific enumeration of powers in this act shall be read to limit the authority of the commission to administer this act.

Hence, the New Jersey Legislature has delegated to Appellee the full measure of the State's police power to ensure achievement of the social, economic and law enforcement goals embodied in the Act.

Against this historical and statutory background, the State Supreme Court was asked to determine whether the

Act authorized the Appellee to adopt the challenged regulation. This determination focused upon yet another express statement of policy and grant of authority to the Appellee, to wit:

> Since the economic stability of casino operations is in the public interest and competition in casino operations in Atlantic City is desirable and necessary to assure the residents of Atlantic City and of this State and other visitors to Atlantic City varied attractions and exceptional facilities, the regulatory and investigatory powers and duties conferred by this act shall include the power and duty to regulate, control and prevent economic concentration in the casino operations and the ancillary industries regulated by this act, and to encourage and preserve competition. [N.J.S.A. 5:12-1(b)(12)].

Upon a review of the entire legislative scheme and the evils at which it was aimed, the New Jersey Supreme Court held that the quoted section meant precisely what it said, *i.e.*, that the Appellee had not only the power but the duty to regulate, control and prevent economic concentration in the ancillary industries, where such concentration threatened the achievement of the statutory goals of stability and effective control. The State Court further ruled that the concentration need not have been wrongly obtained since the *fact* of market domination respecting an essential commodity would jeopardize competition among the casinos, would subject the casinos to potential influence or economic pressure and would undermine the ability of the Appellee to freely enforce the statute against the dominant supplier (for example, by revocation of the supplier's license) for fear of causing severe hardship to the casinos which depended on the needed product. (B.A. 6-7).

With respect to the challenged regulation, the State Supreme Court declared that the Appellee was mandated to prevent slot machine market concentration since, on the undisputed facts, slot machines are essential to casino viability, the slot machine market was dominated by one manufacturer, and there was an absence of significant competition in the sale of slot machines. "In light of these facts, the Commission was obligated to take action to prevent 'economic concentration' in the slot machine market and to 'encourage and preserve competition.'" (B.A. 9).

In concluding that the Casino Control Act both empowered and directed Appellee to take direct regulatory action against dangerous economic concentration, regardless whether the market dominance resulted from fair competition, the New Jersey Supreme Court ruled on an issue of state law. Although Appellant now seeks to have this Court render its own construction of the Act, it is well settled that such review may not be had. This Court has repeatedly held that the construction given to a state statute by the state's highest court is final and that this Court will not undertake to reach a contrary construction. *E.g., Landmark Communications, Inc.* v. *Virginia,* 435 U.S. 829, 837 n.9 (1978); *Mullaney* v. *Wilbur,* 421 U.S. 684, 691 (1975); *Gurley* v. *Rhoden,* 421 U.S. 200, 208 (1975); *O'Brien* v. *Skinner,* 419 U.S. 524, 531 (1974); *Winters* v. *New York,* 333 U.S. 507 (1948); *Alabama* v. *King & Boozer,* 314 U.S. 1, 9-10 (1941); *Murdock* v. *City of Memphis,* 20 Wall. 540 (1875). Moreover, the language of the Act and the sweep of the legislative scheme repel any suggestion that the State Court's interpretation was manifestly unreasonable or "an obvious subterfuge to evade consideration of a federal issue." *Mullaney* v. *Wilbur, supra,* 421 U.S. at 691 n. 11. From this binding statutory interpretation by the State Court, resolution of the immunity issue follows.

In *Parker* v. *Brown, supra,* the Court found no purpose in the Sherman Act to impose antitrust prohibitions on the anticompetitive activities of the state or its officers in implementing programs or policies promulgated by the state in its sovereign capacity. Since *Parker,* this Court has decided a number of cases where the "state action" doctrine was invoked both successfully and unsuccessfully in defense to antitrust challenges. *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975); *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976); *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977); *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389 (1978); *New Motor Vehicle Bd. of Calif.* v. *Orrin W. Fox Co.,* 439 U.S. 96 (1978). Protracted analysis and comparison of these decisions need not be undertaken since, in its most recent pronouncement on the subject, this Court has distilled two standards which must be met for *Parker* immunity: (1) the challenged restraint must be clearly articulated and affirmatively expressed as state policy and (2) the policy must be actively supervised by the State itself. *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Alum., supra.*

Appellant has not asserted any deficiency under the second standard. Thus, the question becomes whether the 50% regulation constitutes a clearly expressed, affirmatively articulated state policy. Given the fact that the Casino Control Act not only authorizes but obligates Appellee to adopt regulations controlling and preventing market concentration which threatens the policies of the Act and given undisputed findings reached by Appellee and affirmed by the State Supreme Court regarding the importance of slot machines and the lack of significant competition, the question is hardly difficult or substantial. The State, as sovereign, has spoken plainly and has di-

rected its agent to correct and reallocate the market to achieve a more balanced mix of competitive suppliers.

Of necessity, the Legislature delegated to the Appellee the responsibility to detect troublesome market concentration and to formulate the appropriate regulatory response. Such express delegation to the exclusive state agency vested with plenary control of the casino industry hardly diminishes the fact that the challenged regulations represents a state policy clearly articulated by the Legislature and implemented by its agent in keeping with the policies and purposes of the enabling statute. See *City of Lafayette* v. *Louisiana* v. *Louisiana Power & Light Co.*, 435 U.S. at 415 (plurality opinion of Brennan J.). Effective control of the Atlantic City slot machine industry is an integral and indispensible component of the overall regulatory system. *Compare Cantor* v. *Detroit Edison Co., supra.* Indeed, slot machines are excepted by Congress from the protections ordinarily afforded activities in interstate commerce, 15 U.S.C.A. §1172, and are deemed contraband under New Jersey law unless they are possessed in accordance with the Casino Control Act and Appellee's regulations. N.J.S.A. 2C:37-7. Beyond any doubt, the New Jersey Legislature had the right to instruct its instrumentality to closely supervise the slot machine trade and to adjust unfavorable market conditions by regulation without resorting to extensive antitrust litigation for past infractions. Therefore, the challenged regulation was plainly the progeny of a clear and express state policy administered by a state agency in accordance with explicit statutory goals and purposes. No substantial question appears.

POINT II

The imposition of a percentage limitation on the number of slot machines supplied to each casino by a single manufacturer and the selection of 50% as the percentage were not arbitrary or capricious but were rationally related to legitimate State interests.

Appellant contends that the imposition of a 50% limitation, on the number of slot machines of a single manufacturer which may be used by each casino, constituted an arbitrary and capricious exercise of the regulatory authority granted to Appellee under the Casino Control Act. Appellant argues that no findings of fact were made by Appellee to support either the use of a fixed percentage or the setting of the percentage at 50%. Rather, Appellant asserts that the Appellee was required to adopt the less restrictive alternative proposed by Appellant. (See B.A. 120, 125-126, 136-138). From the viewpoint of federal law, these arguments are without substance or merit.

In proposing and adopting the challenged regulation, the Appellee was acting in the exercise of the legislative authority granted to it by the State Legislature. *See, e.g., United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). It is settled law that, in reviewing the regulatory enactments of a state administrative agency, this Court will not substitute its judgment for that of the agency and will not disturb the regulation unless it is demonstrably arbitrary or capricious. *E.g., Pacific States Box and Basket Co.* v. *White*, 296 U.S. 1976 ((1935). Moreover, in performing this limited review, the Court will not interfere with the agency's determination if any state of facts reasonably can be conceived to support it. *Id.*, 296 U.S., at 185. The regulation enjoys the presumption that such state of facts exists and the attacking party bears the bur-

den of overcoming the presumption by demonstrating the regulation to be arbitrary. *Id.* In this regard, a regulation adopted by an agency under authority delegated by a state legislature deserves the same deference as is accorded to state statutes. *Id.*, 296 U.S., at 185-186. Thus, specific findings of fact need not be made by the administrative body. *Id.*, 296 U.S., at 186. *Accord Jones* v. *District of Columbia*, 116 U.S. App. D.C. 301, 323 F. 2d 306 (D.C. Cir. 1963).

In the present case, Appellee did find certain general or legislative facts which remain undisputed, specifically, that the slot machine market was dominated by one manufacturer, that the market was marked by an absence of significant competition and that slot machines are critical to the success of casino gaming. (B.A. 9). Appellant's dissatisfaction with the adequacy of these conclusions to justify the regulation stems from Appellee's persistent misconception of the duty imposed upon Appellee and the purpose of the regulation. As demonstrated above, Appellee was authorized and directed to address itself to the *fact* of market domination in essential casino-related goods and services. Once this is understood, the rational relationship between the regulation and the important state interests in effective control of casino gaming becomes obvious. To eliminate the dangers posed by the severely imbalanced slot machine market, as it was developing in Atlantic City during the critical growth phase of the newly established casino industry,[6] Appellee was obliged to take direct and responsive regulatory action. The regulation serves this objective by requiring a balanced and more competitive market structure through the simple but log-

[6] At the time of the adoption of the regulation, June 20, 1979, one casino was in operation and one was about to commence operations. At the time of this writing, there are eight operating casinos with one more scheduled to commence in October 1981.

ical and effective method of a percentage limitation. With regard to the choice of 50% as the limitation, the Appellee balanced the need to reduce domination against the need to provide the competitors an opportunity for a significant market share. While reasonable public officials might differ on this precise figure, it is hardly irrational or unrelated to the valid purposes of the regulation. This is all that is required. *See Pacific States Box and Basket Co.* v. *White, supra.*

For similar reasons, Appellant's contention that Appellee failed to utilize the least restrictive means is equally unavailing. Here again, Appellant misunderstands the reason and purpose of the regulation. The alternative proposal advanced by Appellant (B.A. 136-138), a selective compilation of antitrust and fair competition principles, would not alleviate the Legislature's express concern with market concentration. Moreover, the challenged rule is a state economic regulation. In such matters, the rational relationship test applies. *See Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978). Thus, Appellant's contentions lack substance.

POINT III

The procedures followed in the adoption of the challenged regulation fully complied with the requirements of due process.

Appellant asserts that the procedures utilized by Appellee in proposing and adopting the challenged regulation deprived Appellant of due process. More particularly, Appellant contends that there were disputed factual issues as to which Appellant was entitled to the procedural opportunities normally attendant to an adjudicative hear-

ing. Further, Appellant claims that Appellee conducted a "charade" because, in Appellant's view, the decision to adopt the then proposed regulation was reached without any consideration of Appellant's comments and because Appellee allegedly exercised no judgment in the rule-making process but simply deferred to the suggestion previously made by a potential competitor of Appellee.

As noted above, these contentions do not assail the validity of the regulation itself but rather the method in which the regulation was promulgated. Thus, the appellate jurisdiction of this Court under 28 U S.C. §1257(2) is not properly invoked. Rather, these claims must be considered as a petition for certiorari. Even the most cursory review reveals that these contentions fail to meet the standards for granting such a petition. Appellant has not alleged that the decision of the New Jersey Supreme Court on these issues conflicts in any way with a decision of another state court of last resort or a federal court of appeals. Further, no important federal question which should be, but has not been, decided by this Court is implicated and the decision below fully conforms to previous applicable decisions of this Court.

The challenged regulation is a rule of prospective effect and general application. It was adopted by the Appellee in the exercise of its regulatory or quasi-legislative authority. The law is clear that, in so acting, a state agency is not obligated to afford an adjudicative or trial-type hearing to every affected individual but only to provide fair notice of the proposed rule-making and an opportunity for interested persons to submit their views and comments for consideration. *E.g., United States* v. *Florida East Coast R. Co.,* 410 U.S. 224, 226 (1973); *United States* v *Storer Broadcasting Co., supra*; *Pacific States Box and Basket Co.* v. *White, supra*; 2 *Davis, Administrative Law* (2d ed. 1979) §§12:1 - 12:4.

Appellant argues that the usual rule-making procedure was unfair in this case because there were disputed facts which required resolution in a trial setting before the regulation could be adopted. As already stated above, Appellee relied upon certain general facts and information regarding the status of the slot machine market and the necessity of slot machines to casino viability. These facts are beyond dispute. Although Appellant wishes to draw other, irrelevant matters into question, it has no right to do so.

Appellant's allegation that the proceeding was a "charade" is irresponsible and unsupported. Appellee caused the proposed regulation to be published in the February 8, 1979, issue of the New Jersey Register. Appellant subsequently submitted memoranda and an alternative proposal. These submissions, together with those of other interested persons, were fully considered by Appellee and its staff prior to the June 20, 1979, public meeting when the proposed regulation was approved for adoption. Apellant was afforded the additional opportunity to again present its views to Appellee through its antitrust counsel at the public meeting. Having already reviewed the written submission, Appellee was hardly required to further delay its action on the long-pending proposal. Indeed, neither the federal nor New Jersey administrative procedure acts obliged Appellee to receive oral argument on the matter. See 5 U.S.C. §553 and N.J.S.A. 52:14B-4. The mere fact that Appellee's staff favored adoption of the proposed regulation and read a policy statement at the outset of the June 20 hearing proves nothing as to the fairness of the consideration which Appellant's written submissions received.

As to Appellant's contention that the 50% limitation was first suggested by a potential competitor, it need

only be said that the receipt of views and comments from regulated parties is a proper function of a responsible regulatory agency. Further, the instant record manifests that the ultimate determination to adopt the regulation was a judgment made by Appellee pursuant to its statutory obligations and in furtherance of clearly expressed state policy. It matters not that petitions for legislative action may be submitted to the lawfully empowered body by individuals who may stand to gain by the action sought. *Cf. Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Moreover, Appellant fails to even hint that Appellee was in any way biased in favor of Appellant's competitors or prejudiced against Appellant. Any such insinuation would be preposterous.

Finally, the underlying basis for Appellant's complaint is its assumption that the rule was targeted at Appellant and that its effect would fall most heavily upon it. As to the first, it is simply false. The rule encompasses directly all casino operators in Atlantic City and indirectly every present or future slot machine supplier in that market. In fact, the rule applies the 50% limitation to each casino, not the market as a whole, and thus may prevent additional sales by one of Appellant's competitors, even now when Appellant continues as the leading supplier. As to the second point, the impact of a regulation may often fall immediately and heavily on one party. This alone raises no due process problem. *E.g., United States* v. *Florida East Coast R. Co., supra*, 410 U.S. at 246; *United States* v. *Storer Broadcasting Co., supra.*

In sum, Appellant has not shown any reason why this Court should grant certiorari to hear these ordinary and insubstantial complaints. The applicable principles of procedural due process are well defined and were fully served here.

CONCLUSION

For the foregoing reasons, Appellee respectfully submits tbat the questions discussed in Points I and II herein are so insubstantial as not to require further argument and Appellee respectfully moves the Court to dismiss the appeal on these grounds. As to the questions discussed in Point III herein, no important or novel federal questions are presented and, considering these questions to be brought before the Court on petition for certiorari, Appellee respectfully requests the petition be denied.

Respectfully submitted,

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Counsel for Appellee

[Appendix Follows]

APPENDIX

Excerpt from Page Six of Bally Manufacturing Corporation Form 10K, Filed with the Securities and Exchange Commission for the Fiscal Year Ended December 31, 1977

COMPETITION

Several manufacturers of slot machines in England are significant competitors of the Company in the United Kingdom and two manufacturers in Australia are significant competitors in that market. Although no industry statistics are available, the Company does not believe that it has significant competition in the sale of slot machines in the United States or in any other country (other than those mentioned above) where it markets slot machines, although there are a number of companies throughout the world that manufacture slot machines.

The Company believes that competition in the slot machine market is based primarily on product performance, service and design. Although it is difficult to compare slot machines because of the wide variety of models, the Company believes that the slot machines manufactured by it are priced competitively with similar models manufactured by its competitors. However, the Company believes that because of the wide variety of models offered by it, all of which include devices which provide accounting of income and payouts, and the basic reliability and quality of its machines, the Company is one of the principal slot machine manufacturers in the world.

In the West German market, the Company considers one other manufacturer of German gaming machines as a significant competitor.

C.A. 2

Excerpt from Page Six of Bally Manufacturing Corporation Form 10K, Filed with the Securities and Exchange Commission for the Fiscal Year Ended December 31, 1977

The Company markets flipper-type pinball machines manufactured by it throughout the United States and in some parts of Europe, Asia and Australia. In the flipper-type pinball machine market, the Company competes with several domestic and foreign manufacturers. The Company does not know of any other company presently manufacturing an in-line type pinball machine.

Many companies are engaged in the manufacture and sale of amusement arcade games throughout the world. The Company considers several of these companies, both domestic and foreign, as significant competitors.

The Company believes that competition in the German gaming market, the flipper-type pinball machine market and the amusement arcade game market are all based primarily on the design and player appeal of the various machines. Comparable equipment in these fields is

C.A. 3

Paine Webber Mitchell Hutchins, Inc. Basic Analysis of Bally Manufacturing Corporation (October 31, 1978)

BALLY MANUFACTURING CORP (NYSE:BLY)

Recent Price:	$35½	Indicated Dividend:	$0.10
Last 52 Weeks Range:	$71¾-15	Indicated Yield:	0.3%
Shares Outstanding:	11.9MM	Market Value:	$422MM

Earnings Per Share		*Price/Earnings Ratio*
1975	$0.66	——
1976	1.04	——
1977	1.61	——
1978E	2.50	14.2
1979E	4.50 (4.00-5.00)	7.9 (8.9-5.1)
1980E	6.00 (6.00-8.00)	5.9 (5.9-4.4)

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C.A. 4

Paine Webber Mitchell Hutchins, Inc. Basic Analysis of Bally Manufacturing Corporation (October 31, 1978)

CAPITALIZATION JUNE 1978

$(000)

Long-term Debt	$ 39,903	23.0%
Short-term Debt	11,750	6.8
Stockholders Equity	121,600	70.2
	$173,253	

October 31, 1978

Lee S. Isgur
(212) 437-6243

BALLY MANUFACTURING CORPORATION

RECOMMENDATION AND SUMMARY

The rules regulating gaming are entering a period of rapid liberalization, both nationally and internationally. The common stock and convertible debentures of Bally represent one of the best ways of capitalizing on this change, since:

> The slot machine is the cornerstone of almost every casino's product mix. Bally, the world's leading slot machine manufacturer, has an estimated 80% share of the U.S. market.
>
> Atlantic City, New Jersey is the world's most rapidly growing new market for casino gaming. With the proceeds from its recent $50MM 6% debenture (convertible at $62), we expect Bally will open a new Atlantic City gaming casino in 1979 (which would be the second or third casino).

C.A. 5

Paine Webber Mitchell Hutchins, Inc. Basic Analysis of Bally Manufacturing Corporation (October 31, 1978)

> The pinball machine has become more popular in recent years. Bally, with its innovative development of the solid-state pinball machine, has become the world's leading pinball machine producer, leap-frogging Gottlieb and Williams.

In our opinion, Bally has more "irons in the fire" than any other company with which to capitalize on the liberalization of legislation regulating "games of chance".

The Company

Most people know Bally Manufacturing Corporation as the world's leading slot machine manufacturer. The company today is also the world's leading pinball machine manufacturer. In addition, its Aladdin's Castle operation is probably the leading operator of pinball machines and arcade games in the U.S. Aladdin's Castle operates over one hundred (115 as of June 30, 1978) family amusement machine arcades located principally in major enclosed shopping centers scattered across the United States and Canada. Through several wholly-owned distributors, Bally is also the country's largest distributor of pinball machines. Both Aladdin's Castle and its own distributors handle competitive as well as Bally manufactured products. Thus, these operations, besides contributing to earnings growth, give the company valuable information about how their own products stack up against the competition.

The company has a small electronic consumer game operation which has been plagued by a number of startup problems. Results over the next two Christmas seasons

should indicate whether this will eventually become a viable operation.

The company owns three contiguous hotel properties on nine acres along the Atlantic City boardwalk. Through a combination of refurbishing and new construction (after tearing down certain parts of the original), Bally hopes to have Phase I of its Atlantic City casino/resort complex open about the middle of next year. Assuming the project is successful, this will probably be the first of a number of casinos owned and operated by the company.

BLY does not break out of its earnings by divisions or product lines. Thus, the following breakout is nothing more than a rough estimate on our part.

Estimated Approximate Earnings Per Share By Operation

	1980E	*1979E*	*1978E*	*1977*	*1976*	*1975*	*1973*	*1974*
Slot Machines	$1.50	$0.90	$0.90	$0.60	$0.40	$0.35	$0.60	$0.33
German Gaming Machines	0.60	0.50	0.50	0.45	0.70	0.80	0.75	0.60
Total Gaming Machines	2.10	1.40	1.40	1.05	1.10	1.15	1.35	0.93
Casino Operations	2.30	1.50	—	—	—	—	—	—
Other Operations and Corporate Expenditures	1.60	1.60	1.10	0.55	(0.05)	(0.50)	(0.30)	(0.30)
	$6.00	$4.50	$2.50	$1.61	$1.04	$0.60	$1.05	$0.63

SLOT MACHINES

Without slot machines, it is questionable how many of Nevada's "successful" casinos could remain profitably in

business. Before a casino operator takes delivery of a slot machine, it is normally preset at the factory to pay back over 5000 cycles (plays) a certain percentage of what is put in by the players. Thus, unless the machine is malfunctioning, an operator normally knows exactly how much each machine will win every 5000 cycles. At the same time, unlike other "games of chance" whether they be blackjack, craps, roulette, baccarat, wheel of fortune or what have you, the casino operator does not have to worry about employee shifts, unions etc. when dealing with his slot machines. As one operator told us, his slot machines "don't have to be fed or go on breaks and require no fringe benefits".

Over the past decade, with the growth of Nevada gaming (we estimate over 60,000 slots are now in use in Nevada), a number of companies have announced that they were going to enter the slot machine manufacturing business and challenge Bally's pre-eminent position. (We estimate that unit-wise, Bally will account for about 80% of all slots sold in the U.S. in 1978 and about 90% based on dollar value.) Such companies as Centronics Data and Xcor (formerly Seeburg Corp.) readily come to mind. But other than Bally and possibly the small privately owned Nevada-based Jennings Corp., no one has made a successful penetration of the slot machine market. While we believe it is financially possible to enter the slot market (our estimate is that it would take about a $15 to $25 million investment), we believe anyone new starting to sell slots today would have to wait at least three years before they begin to get a return on their investment. We arrive at this conclusion based on the belief that the cost of a slot machine, in determining whether it can be mar-

keted effectively, is secondary in importance to its reliability and popularity with slot players; for the slot machines that make the most money are in high volume locations where they are set to pay back to the player often as high as 97% of what players put in them. Hence, at locations such as these, downtime and lack of popularity are what a casino operator can least afford if he wishes to stay in business. Thus, if a casino operator can be persuaded to install new untested slots in his casino, most likely it will be relegated to a low volume, out-of-the-way location. At this type of location, it will get the same amount of play in six months to a year that slots located in the prime high traffic locations get in a week to a month. Therefore, the quantity tested and accumulated experience on a slot machine from a new manufacturer will not be sufficient, we believe, until the casino operator has had a limited number of functional machines for approximately three years. It is our contention that this long lead time needed before initial payback will discourage most potential competitors from entering the slot machine market.

In the meantime, as a means of further strengthening its market position, BLY has spent over three years and several million dollars developing a sophisticated system, which can put its slot machines on-line with a computer. This system is designed to instantly provide a readout to casino management through the casino's computers of the condition of the machine with regard to security, cash, maintenance and pay-out ratios. The first one of these systems is now in operation, having successfully completed its extensive and lengthy on-site test at the Las Vegas Hilton (780 slots). Another one is presently being installed at the Flamingo Hilton in Las Vegas (685 slots). We ex-

pect BLY will soon begin offering similar on-line slot machine computer systems (known as SDS II for Slot Data System II) to other casino operators. We see three very important aspects of this development:

> An on-line slot machine system will not only be more secure from vandalism, but should result in significantly less downtime for slot machines and require less casino personnel for support.
>
> The successful development of the on-line system should give BLY a further significant lead over any potential slot machine manufacturers.
>
> We believe that the successful development of these on-line systems will result in BLY being able to upgrade many existing slot machine installations to this level of sophistication. Also, we believe a significant number of new orders will be for this on-line equipment. This should result in the average unit value per slot machine shipped rising significantly. We estimate that BLY realized substantially in excess of $1MM from the sale of this system with a very high profit margin. Since HLT will have over 1,000 slots on this system, this would mean a cost to HLT of about $1,000 more per slot and, similarly, this much more to BLY on a per slot basis.

The U.S. Treasury Department has been authorized to mint a new dollar coin that will be slightly larger than a quarter. This is expected to come into widespread use in 1980. It will require the replacement or retrofitting of many existing $1 slot machines and, to the extent that it stimulates greater use of dollars, it should result in in-

creased sales of $1 slots. BLY has both domestic (Chicago and Las Vegas) and foreign (Dublin) slot manufacturing facilities. In addition, a limited number of specialty machines are manufactured in Reno. BLY also has a plant in West Germany, which manufactures German gaming machines solely for the German market.

BALLY SALES OF GAMING MACHINES

	1978E	*1977*	1976	*1975* (000)	*1974*	*1973*	*1972*	1971
Domestic	$46,000	$23,736	$13,378	$ 7,913	$10,367	$ 6,406	$ 7,710	$6,310
Foreign	9,000	11,505	9,977	12,982	23,877	19,273	13,189	9,189
Total	$55,000	$35,241	$23,355	$20,985	$34,244	$25,679	$20,899	$15,499
German*	$29,000	$27,273	$35,838	$38,847	$36,019	$30,565	$15,840	NA

The sharp decline in foreign slot machine sales in 1975 was the result of a change in slot machine regulations in Japan. Prior to that, Japan had become BLY's largest foreign slot machine customer (sales rose from $1MM in 1972 to $6MM in 1973 to $10.4MM in 1974). In addition, the initial sale of 1300 slot machines ($2.1MM) to Puerto Rico (after limited legalization in 1974), helped that year's figures. Domestically, a combination of higher prices, a steadily growing Nevada gaming industry, and a shift from single coin to multiple coin slots have all contributed to a doubling of average annual slot sales between the late-1960's and the mid-1970's. Recently, the domestic slot machine business has picked up dramatically. This has been

* Acquired April 1, 1972.

a function of continuing inflation, an almost explosive growth in the popularity of dollar slot machines, and rapid casino expansion throughout Nevada and now Atlantic City. Further, inflation and a growth in the popularity of dollar slot machines plus the possibility of additional casinos should result in this figure keeping at or possibly rising above current levels next year. Additional casinos and a new dollar coin almost assures this area of BLY's business rising to new record levels in 1980.

The typical slot machine manufactured by BLY today sells for $2,500 to $4,000 ($1 machines list for $3,900). Although no official profit figures have ever been given, it is widely believed that BLY generates about a 40% pretax profit margin on its slot machines. We further estimate that in recent yaers this figure may have been as low as 30%.

This data leads us to believe that if BLY's slot revenues nearly double by 1980 to approximately $100MM, EPS (assuming full dilution) from this source could reach $1.50 to $2.00. Assuming a continuing high level of new casino development, annual slot machine earnings in the 1980s of $1.50 to $2.00 per share do not appear unreasonable.

In addition, we estimate the incremental slot business carries a 50% pretax profit margin. This means that if the average machine sells for about $2,500, each additional sale of 1,000 machines will add $0.05-0.06 to earnings per share. (1,000 machines x $2,500 x 50% pretax x 50% tax rate ÷ 12MM shares — $.05-.06 per share.)

Probably the scarcest commodity in the casino industry is skilled managerial talent. Since slot machines make

fewer demands on managerial time, it is reasonable to expect that if there are a large number of new casinos, slot machines will play even a more prominent part in these casinos than they have until now. It is also logical to assume that BLY's on-line slot data system will account for an important part (over 10% in dollars) of their total slot business. All of this adds up to more unit slot machine sales at better prices in the 1980s. Thus, potential BLY slot sales could even rise above the $100MM level. Remember, however, four things:

> Today the whole state of Nevada has about 60,000 slot installations.
>
> Resort International's single Atlantic City casino currently has about 1,400 slots in approximately a 50,000 square foot casino.
>
> It would take about 33,000 slot machine sales at $3,000 per slot to equal $100MM.
>
> Without innovation or coin modifications, slot machine life is quite long. (This explains why, even today, well-used machines easily sell for prices of $1,000 and more.) Without new casinos, innovations and changes in coin styles, slots in well-run casinos appear to last 7-10 years. This would mean that about 6,000-9,000 of the slots in use in Nevada today would have to be replaced annually. Under these assumptions, Nevada replacement demand is worth $15MM-27MM to BLY.

On the other hand, the possibility of new geographic areas legalizing slots could double, triple or even more

than quadruple the slot machine market. Currently, England* and Australia are BLY's biggest foreign markets. Spain, which recently approved casino gaming, should become an important new market soon and we believe this could be followed by Mexico in 1980 or 1981. The German gaming machines made by BLY's German subsidiary are virtually unique to that market. Under German law, a German gaming machine must be taken out of service in Germany after three years use. At that time, they must either be scrapped or disposed of in the few locations that utilize these machines. BLY's Gunter Wulff German subsidiary, acquired for $11.7MM in April, 1972, has about a 35% share (historically, this share has ranged to nearly 50%) of the German gaming machine market. It is one of the two principal manufacturers of machines in that country. Prior to acquisition, the company had a 44% pretax profit margin. We believe margins have stayed in the 40% to 45% range.

As stated earlier, the estimanted EPS numbers by operation on the cover are very rough approximations on our part, but they illustrate a point that we believe to be highly accurate. Historically, as went gaming machines, so went BLY. Given our optimistic forecast about prospects for this area, this can't be all bad. However, it appears that management, while primarily keeping BLY in the "games of chance" industry, has markedly broadened the ways BLY is participating in this industry. We all know this diversification is scheduled to take a major

* The Royal Commission report on gaming makes recommendations which include some liberalizations of slot machine use beginning next year.

step in 1979 with the opening of BLY's first casino. Until now, however, this diversification has taken two important routes. One has been the manufacture of pinball and video games and the other has been distribution and operation of games. In recent years, these diversifications have resulted in the company developing other significant sources of earnings.

PINBALL AND VIDEO ARCADE GAMES

The non-slot machine "games of skill" area, generally thought of as pinball, but actually encompassing flipper pinball and in-line pinball, has fallen on hard times

• • • •

In the case of BLY, its ultimate conclusion was that BLY qualified to receive a license in Nevada as a publicly traded company which today permits it to engage in gaming in that State.

CONCLUSION

We believe the casino gaming business and, to a lesser extent, the pinball machine business are going to grow substantially over the next five years. BLY Manufacturing Corp. is the world's leading manufacturer of slot and pinball machines. While stocks with a potential involvement in the developing casino gaming industry have surged and then collapsed, investors appear to have not dug too deeply into the investment merits of the various companies. Bally Manufacturing, with its already

Paine Webber Mitchell Hutchins, Inc. Basic Analysis of Bally Manufacturing Corporation (October 31, 1978)

exeellent growth record, will benefit more than anyone else from further growth in the casino gaming business.

Slot machines are the cornerstone of every major domestic casino operation. BLY's 80% market share and product leadership assures them of the bulk of all slot machine sales for at least the next several years. A shift to a new dollar coin in 1980 will probably further stimulate slot machine sales at that time.

One of the most critical problems facing the developing casino gaming industry is lack of skilled managers. Slot machines requiring little skill from players and managers alike, fit the bill at this time.

BLY will probably be one of the next casinos to open its doors in Atlantic City. With $50MM in hand from the recent convertible debenture offering, BLY has the financial wherewithal to do this while it is likely that others with less financial muscle will see their plans falter.

In recent years more of the company's activities have been shifted into distribution and operation rather than just manufacturing. While the gross margins on these newer activities are lower, the continuity of their income is better.

In the final analysis then, BLY on its past record and leadership position in the industries it serves is an interesting investment vehicle. But with the virtual explosion in casino gaming developments, Bally Manufacturing appears to be uniquely positioned to take advantage of all aspects of these developments. At the same time, it must be realized that casino gaming is a regulated business activity. Thus, as new geographical legalized

Paine Webber Mitchell Hutchins, Inc. Basic Analysis of Bally Manufacturing Corporation (October 31, 1978)

gaming areas open, some will be regarded as favorable regulatory environments while others will not. BLY will almost assuredly sell slot machines in all of these markets and thus benefit from these developments and yet not have its profitability restricted because the regulatory climate is unfavorable. We expect as long as investors' perceptions indicate that legalized casino gaming will continue to grow geographically and rapidly, BLY will sell at a premium to most other gaming related issues.

BLY's multiple is currently below that of many other gaming related issues based on our projections of its prospects over the next several years. Hence, we recommend the purchase of BLY common stock at present levels.

October 31, 1978 Lee S. Isgur (212) 437-6243

Excerpt from Bally Manufacturing Corporation 1977 Annual Report

Slot machines—Bally has been one of the world's leaders in the manufacture and sale of slot machines since 1963 when it introduced the first modern, electro-mechanical machine. We now manufacture more than 60 different models. The importance of slot machines to the gaming industry is evidenced by the fact that revenues from slot machines accounted for approximately 38% of gross gaming revenues in Nevada in 1977.

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No. 80-2202

IN THE

Supreme Court of the United States

October Term, 1980

BALLY MANUFACTURING CORPORATION,
a Delaware corporation,
Appellant

vs.

NEW JERSEY CASINO CONTROL COMMISSION,
Appellee

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Does the New Jersey Casino Control Act as interpreted by the Supreme Court of New Jersey conflict with the Sherman Act right of a private entrepreneur to prevail over competition by superiority of product, service and reliability?

2. Does the state action exemption apply when the state statute, far from mandating the anticompetitive regulation here in question, expressly mandates promotion of competition and merely authorizes in general terms regulations regarding competition and concentration?

3. What type of consideration is required when a state court passes on a claim of exemption from the Sherman Act based on state action?

*Appellant has listed its subsidiary corporations in its Jurisdictional Statement pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States. The list requires no amendment.

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ARGUMENT

Appellee's Motion to Dismiss contains a number of generalizations about state action and due process, but fails to address those issues which make the substantive federal questions presented unique and important. Among the central issues avoided by the Motion to Dismiss, and requiring consideration by this Court, are the following:

I. DOES THE NEW JERSEY CASINO CONTROL ACT AS INTERPRETED BY THE SUPREME COURT OF NEW JERSEY CONFLICT WITH THE SHERMAN ACT RIGHT OF A PRIVATE ENTREPRENEUR TO PREVAIL OVER COMPETITION BY SUPERIORITY OF PRODUCT, SERVICE AND RELIABILITY?

Appellee argues that the New Jersey statute directs divestiture of major market shares "no matter how obtained." (See Appellee's Motion, pp. 9 and 16). The proposition is absurd and flies in the face of federal antitrust laws, as can be seen clearly from two hypotheticals which are by no means remote from the present case:

> (i) In a market fully served by two interstate suppliers, one of them goes bankrupt in the course of fair competition with the other, leaving the latter as a sole supplier; and
>
> (ii) A manufacturer invents, perhaps even patents, a new and attractive gaming machine and becomes, of necessity, the sole initial supplier.

Consistent with the antitrust laws, this Court should not allow a state to dismember such a sole, or dominant, supplier.[1]

[1] As evidence of the continuing firm federal policy against penalizing fair competitive success, see the Address by Attorney General William French Smith to the District of Columbia Bar (June 24, 1981):

> . . . In a race, the fastest runner is not penalized by being required to wear fetters around his or her ankles. Similarly, in an economy based upon unfettered competition as the rule of trade, efficient firms should not be hobbled under the guise of antitrust enforcement. The preservation by government of inefficient competitors inevitably leads to economic distortions that will disadvantage the consumer. Address by Attorney General William French Smith to the District of Columbia Bar (June 24, 1981), *reprinted in* [1981] 5 *TRADE REG. REP.* (CCH) ¶ 50,430.

The breadth of state authority for which Appellee argues is of awesome scope. It not only implies power to restrict sales, as was done in the present case, but also permits utilization of other "structural" techniques, presumably including the splitting up of an out-of-state supplier as Appellant by compulsory spinoff of operations and assets. Pursuant to the unbounded rule advanced by Appellee, the state could pursue its "anticoncentration" purposes even by compelling the most efficient and successful supplier, to *raise* its prices so as to create greater sales opportunities for its less efficient competitors. (See Appellee's Motion, pp. 18-19) In hypothetical (ii) above, the New Jersey contention that "*any* restraint on competition," whether or not resulting from predatory conduct, can be outlawed by state administrative action (Appellee's Motion, pp. 11 and 13) would encompass a direct contradiction of even the Federal Patent Act.

Such potentials are of grave concern not only to Appellant but to the suppliers of other gambling equipment who are often sole suppliers because of the limited nature of the market. This Court is asked to sustain a radical and unnecessary extention of state power over interstate commerce if any reasonable set of facts "can be conceived to support it." (Appellee's Motion, p. 10)

II. DOES THE STATE ACTION EXEMPTION APPLY WHEN THE STATE STATUTE, FAR FROM MANDATING THE ANTICOMPETITIVE REGULATION HERE IN QUESTION, EXPRESSLY MANDATES PROMOTION OF COMPETITION AND MERELY AUTHORIZES IN GENERAL TERMS REGULATIONS REGARDING COMPETITION AND CONCENTRATION?

The opinion below explicitly states that "the regulation in question is 'within the framework of the *broad*

powers conferred on the Commission' (Jurisdictional Statement, p. A-7(a)) and is 'authorized and permitted by the Casino Control Act.'" (Jurisdictional Statement, p. A-12(a)) The specific anticompetitive regulation here in question is thus entirely a creature of the Casino Control Commission's discretion. It is absurd to suppose that the Casino Control Commission would have violated the enabling act if it had *not* adopted the 50% regulation or merely had adopted safeguards against such abuses as it perceived.

Appellee misconstrues (Appellee's Motion, p. 14) the thrust of Appellant's argument. Appellant is not asking this Court to rule on an issue of state law. Appellant maintains only that the New Jersey statute as construed by the New Jersey Supreme Court does not "clearly articulate" nor "affirmatively express" a sovereign determination to repress and displace competition.[2]

> Appellee, on the other hand, argues that:
> . . . *any restraint on competition under the regulation* is immune from attack under the antitrust laws. (Emphasis added) (Motion, Point I)

Appellee fails to recognize that the *clearly articulated state policy,* requires not a "restraint on competition" but, in fact, the promulgation of regulations which "*encourage and preserve* competition." (Emphasis added) Therefore, the adoption and enforcement by Appellee of a regulation that imposes a "restraint on competition", as Appellee admits in its Motion that the subject regulation does, is contrary to the state's articulated policy, surely *not* man-

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[2] In addition to the cases cited in Jurisdictional Statement, p. 9, see *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Affiliated Capital Corp v. City of Houston*, No. H-79-1391 (S.D. Tex., July 7, 1981). (Home rule for a city does not make it the voice of sovereign state policy to displace competition.)

dated by it, and therefore not "immune from attack under the antitrust laws."

As a consequence, a substantial and critical federal question, whether the anticompetitive action of the State of New Jersey in violation of the Sherman Act is immunized under the standards enunciated and enforced by this Court, is clearly and squarely before the Court in this case.

III. WHAT TYPE OF CONSIDERATION IS REQUIRED WHEN A STATE COURT PASSES ON A CLAIM OF EXEMPTION FROM THE SHERMAN ACT BASED ON STATE ACTION?

Is it sufficient in dealing with such an issue of federalism simply to identify a state regulatory interest or must there not also be a reasoned effort to reconcile the divergent federal and state concerns? It is absolutely critical here to distinguish between the "core" state police power over local gambling in Atlantic City's casinos and the state's ancillary concern with out-of-state suppliers. With respect to the latter, the state's power to license and closely supervise is acknowledged; but state power to displace the national law of competition cannot be assumed merely "if any reasonable set of facts can be conceived to support it." (Appellee's Motion, p. 10) Such displacement must be conditioned, at the very least, upon a reasoned analysis of the nature and source of the market structure, upon a consideration of alternate means of achieving legitimate state objectives while minimizing conflict with federal law, and upon experience with similar market structures in comparable jurisdictions, e.g., the State of Nevada. Surely the discretionary action of a state administrative agency should not be given greater presumptive effect than federal courts would give to federal administrative action.

Sentence first and trial afterwards has not been regarded as due process of law, at least since Lewis Carroll wrote "Alice's Adventures in Wonderland."[3] Without reiterating the circumstances of the Appellee's "hearing" of June 20, 1979, set forth in Jurisdictional Statement at 14-16, it may be illuminating to consider here two proposals earlier advanced by Appellant and totally ignored by the Appellee:

(i) A proposal to free smaller casinos from the imposed burden of splitting their sources of supply with resultant complication of their maintenance, inventory and repair problems; and

(ii) A proposal to exclude from the 50% quota rule the sale of used machines so that original manufacturers were not additionally penalized by second-hand sales of their machines by subsequent dealers and competitors.

So rigidly was Appellee's solution cast in stone prior to the "hearing" that these ideas were rejected without consideration, even though they were consistent with the theoretical intent of a 50% quota and would have facilitated its operation, ill-conceived though it was.

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[3] L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND 118 (New York Chanticleer Press, 1948) (1st ed. London 1865).

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that Appellee's Motion to Dismiss be denied.

Respectfully Submitted,

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